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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 163

THOMAS J. BRADY, PETITIONER,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

PETITION FOR CERTIORARI FILED JUNE 22, 1937.

CERTIORARI GRANTED NOVEMBER 8, 1937.

SUPREME COURT OF THE UNITED STATES

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INDEX.

	Original	Print
Proceedings in Supreme Court of Missouri	a	a
Caption	a	a
Record from Circuit Court of City of St. Louis	a	a
Caption	a	a
Verdict and judgment	a	a
Order allowing appeal	b	b
Clerk's certificate	c	c
Appellant's abstract of record	1	1
Caption	1	1
Third amended petition	2	1
Answer to third amended petition	6	4
Reply to answer	8	5
Trial	8	6
Verdict and judgment	8	6
Defendant's motion for new trial	9	6
Defendant's motion for new trial overruled	9	6
Appeal granted	9	7
Transcript filed in the Supreme Court	10	7
Bill of exceptions	10	7
Third amended petition	11	8
Demurrer to third amended petition	15	10

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 16, 1937.

—2279

	Original	Print
Record from Circuit Court of City of St. Louis—Continued.		
Appellant's abstract of record—Continued.		
Bill of exceptions—Continued.		
Motion to require plaintiff to elect	16	11
Motion to strike out	18	12
Memo. on motion to strike out	20	13
Statement of evidence	22	14
Caption	22	14
Appearances	23	14
Testimony of Thomas J. Brady	23	15
Dr. Victor J. Meinhardt	42	30
Thomas J. Brady (recalled)	63	48
Plaintiff's Exhibit 1—Rule book	77	59
Testimony of Dr. Joseph C. Peden	80	62
Dr. F. G. Pernoud	88	69
Defendant's motion for instructed verdict	110	87
Testimony of Dr. Leo A. Will	111	87
Defendant's requested instructions, refused	132	104
Instructions given to jury	135	107
Verdict and judgment	141	110
Defendant's motion for new trial	142	111
Affidavit for appeal	145	113
Order settling bill of exceptions	146	114
Minute entry of argument and submission	151	115
Judgment	151	115
Motion to transfer to court en banc	153	117
Motion for rehearing	153-3	118
Order overruling motion for rehearing and sustaining motion to transfer to court en banc	154	129
Minute entry of argument and submission	154	129
Judgment	154	129
Opinion, Hays, J.	156	130
Motion for rehearing	168	141
Suggestions in support of motion for rehearing	171	143
Motion to modify opinion	174	145
Order overruling motion for rehearing and motion to modify opinion	176	147
Clerk's certificate	176	147
Orders allowing certiorari	177	149

TRANSCRIPT OF THE PROCEEDINGS FROM THE SUPREME COURT OF MISSOURI

In the Case of

THOMAS J. BRADY, Respondent,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corp., Appellant

UNITED STATES OF AMERICA,
State of Missouri, ss:

Be it Remembered that, heretofore, to-wit, on the 31st day of January, 1934, there was filed in the office of the Clerk of the Supreme Court of the State of Missouri, in a cause entitled Thomas J. Brady, respondent, against Terminal Railroad Association of St. Louis, a corporation, appellant, No. 33,525, a certified transcript, said transcript being in words and figures following, to-wit:

STATE OF MISSOURI,
City of St. Louis, ss:

Be it Remembered, that heretofore, to-wit: at the September Term, Nineteen Hundred and Thirty-three of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, and on the Twenty-first day of November, 1933, it being the Fortieth day of the September Term, 1933, of said Court, the following proceedings were had in cause No. 144602 Series "B" of the causes in said Court, wherein Thomas J. Brady is plaintiff and Terminal Railroad Association of St. Louis, a corporation, is defendant, to-wit:

Tuesday, November 21, 1933.

144602-B

THOMAS J. BRADY

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation

Now at this day come again the parties hereto by their respective attorneys, comes also again the jury heretofore sworn and impaneled herein; thereupon the trial of this

cause is resumed and progressed and during the progress of the trial, plaintiff by leave of Court first had and obtained amends his third amended petition by interlineation by changing in line three, page four thereof the words and figures Three Hundred Dollars ($300.00) to Five Hundred Twenty Dollars ($520.00); thereupon the trial of this cause further progressed and being terminated, the jurors aforesaid upon their oaths as aforesaid say:

"We, the Jury in the above cause, find in favor of the Plaintiff on the issues herein joined and assess plaintiff's damages at the sum of Fifteen Thousand Dollars.

D. C. Cunningham, Foreman."

Wherefore it is considered and adjudged by the Court that the plaintiff have and recover of defendant, the sum of Fifteen Thousand and 00/100 Dollars ($15,000.00), together with the costs of this suit and have therefor execution.

Verdict and instructions, filed.

And at the December Term, 1933, the following further proceedings were had in said cause, to-wit:

Monday, January 8, 1934.

144602-B

THOMAS J. BRADY

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation

Now at this day comes defendant by attorney and files and presents to the Court its affidavit for an appeal and prays an appeal to the Supreme Court of Missouri, and also presents to the Court its appeal bond conditioned according to law in the penal sum of $30,000.00, with The Wiggins Ferry Company, as surety; and the Court having seen and examined said affidavit and bond, doth order that said bond be approved and filed which is now accordingly done, and that an appeal be and is hereby allowed the defendant to the Supreme Court of Missouri, from the judgment or decision of the Court heretofore rendered herein.

STATE OF MISSOURI,
City of St. Louis, ss:

I, John Schmoll, Clerk of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, certify the above and foregoing to be a full, true and complete transcript of the record entry of the judgment in the above entitled cause, showing the term and day of the term, month and year upon which the same shall have been rendered, together with the order granting the appeal in the above entitled cause, as fully as the same remain of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis, this 15th day of January, 1934.

John Schmoll, Clerk, Circuit Court. (Seal.)

And thereafter and on the 12th day of December, 1935, there was filed appellant's abstract of the record, which said abstract of the record is in words and figures following, to-wit:

[fol. 1] **IN SUPREME COURT OF MISSOURI**

SEPTEMBER TERM, 1935

JANUARY CALL, 1936

No. 33,525. Div. No. 1

THOMAS J. BRADY, Respondent,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation, Appellant

Appeal from the Circuit Court of the City of St. Louis

Honorable O'Neil Ryan, Judge

Appellant's Abstract of the Record

This action was instituted by the plaintiff, Thomas J. Brady, against defendant, Terminal Railroad Association of St. Louis, a corporation, by filing his petition in the Cir-
[fol. 2] cuit Court of the City of St. Louis, Missouri, on August 17, 1929, to the October Term, 1929, of said Circuit Court. On February 6, 1933, at the February Term, 1933, of said Circuit Court, plaintiff filed his Third Amended Petition in said cause. Said Third Amended Petition was the petition on which said cause was tried. Omitting caption and signatures, said Third Amended Petition is in words and figures as follows:

THIRD AMENDED PETITION

Plaintiff by leave of Court files this his third amended petition and states that the defendant now and is, at all times herein mentioned was, a corporation duly organized and existing under and by virtue of law, and as such was engaged in the business of owning and operating a system of railroads as a common carrier of passengers, goods and freight for hire, by railroad, in interstate commerce, engaged in interstate commerce between the several states of the United States; that as such, in its said business, defendant operated, managed and controlled, moved and

used cars, railroad equipment and appurtenances, used in interstate commerce; that defendant at all times did and now does business in the State of Missouri, with an office and place of business in the City of St. Louis, Missouri.

Plaintiff further states that on and prior to the 20th day of November, 1927, he was in the employ of the Wabash Railway Company, a corporation, duly organized and existing under and by virtue of law, engaged in the business of [fol. 3] owning and operating a railroad as a common carrier of goods, freight and passengers for hire in interstate commerce; that plaintiff was working for the Wabash Railway Company as a car inspector in its yards located at or near Granite City in the State of Illinois, and was engaged in his duties as such for said Wabash Railway Company in interstate commerce; that he and said Wabash Railway Company were then and there engaged in interstate commerce, and were engaged in and about the inspection of cars destined in interstate commerce, and cars having interstate freight therein, and to be further moved in interstate commerce, and plaintiff in the performance of his duties as such employee was required to go upon a freight car for the purpose of inspecting its equipment, to determine whether or not said car was to be accepted or rejected by his employer aforesaid; that in order to climb upon said freight car plaintiff used a ladder and grabiron or handhold that were then and there upon said car; that immediately prior to said time said freight car was placed upon the tracks there, it was hauled and moved by defendant and tendered by defendant to the Wabash Railway Company equipped with an insecure grabiron or handhold on the roof of said car; that when plaintiff took hold of said grabiron, said grabiron became detached from said car, and plaintiff fell to the ground below and was injured as hereinafter mentioned, all of which occurred through violation of law on the part of the defendant, and particularly the laws of the United States in such cases made and provided, and in violation of defendant's rules and regulations, and rules and regulations of the American Railway Association, adopted [fol. 4] by and which were binding on defendant, which provided that cars, whether loaded or empty, having defects in violation of the Safety Appliance Acts, should not be offered in interchange.

And plaintiff further states that defendant did further

violate the law in that defendant did negligently fail to inspect or discover said insecure handhold or grabiron prior to plaintiff's injury aforesaid, when in the exercise of ordinary care said insecure grabiron could and should have been discovered prior to plaintiff's injury aforesaid, and did negligently suffer and permit said grabiron or handhold to be and remain in the aforesaid insecure condition, when the defendant knew or by the exercise of ordinary care on its part would have known of its aforesaid condition, and when defendant knew, or by the exercise of ordinary care on its part would have known, that employees of the Wabash Railway Company would be required to go upon said car and use said equipment, and that by reason thereof there was danger of injury to said employees. And plaintiff states that as a direct result of the violation of law, as hereinbefore mentioned, plaintiff was seriously and permanently injured in this, to-wit:

Plaintiff's back, spine, sacral joints, chest, lungs, left hip, and the bones, joints, ligaments, nerves, tendons, tissues, membranes and vessels thereof were seriously contused, wrenched, sprained, strained, swollen, inflamed and infected, dislocated and separated; that his head was bruised and contused; that prior to the time of said injury plaintiff was not conscious of suffering with any disease or disability in the region of his back and spine, and that on account of said [fol. 5] injury a dormant, pre-existing arthritis thereof was caused to become active and painful; that said arthritis did progress and become aggravated and disabling; that plaintiff's head was bruised and contused; that his nerves and nervous system were severely shocked; that all of said injuries and the effects thereof are serious and permanent; that plaintiff has suffered and will in the future continue to suffer from headaches, nervousness, insomnia, loss of weight; that plaintiff has suffered, is suffering and will in the future continue to suffer bodily pain and mental anguish; that plaintiff has incurred and become obligated for medical attention in the sum of Five Hundred and Twenty Dollars ($520.00), and in the future will be required to expend sums for such purposes; that plaintiff has lost and will in the future continue to lose all or the greater portion of his wages and earnings; that at the time of his said injury plaintiff was earning approximately One Hundred and Seventy-five Dollars ($175.00) a month; that plaintiff's

ability to engage in any gainful occupation or to enjoy life has been seriously and permanently impaired and diminished; that plaintiff has been injured and damaged in the manner aforesaid in the sum of Forty Thousand Dollars ($40,000.00), for which sum, together with his costs, he prays judgment against defendant.

On May 19, 1933, at the April Term, 1933, of said Circuit Court, defendant by leave of court filed its answer to plaintiff's third amended petition. Said answer to plaintiff's third amended petition, omitting caption and signatures, is as follows:

[fol. 6] DEFENDANT'S ANSWER TO PLAINTIFF'S THIRD AMENDED PETITION

1. Comes now defendant and, leave of Court first being had and obtained to plead, for its answer to plaintiff's petition filed herein, denies each and every allegation in said petition contained.

2. Further answering, defendant says that the plaintiff was working for the Wabash Railway Company, a railroad corporation, as a car inspector in its yards located at or near Granite City, in the State of Illinois, and, on the occasion mentioned in his third amended petition plaintiff was engaged in his duties as such car inspector with respect to cars tendered said Wabash Railway Company by defendant, as was the custom relative thereto, to determine by inspection whether or not cars so tendered were defective as to safety appliances or otherwise; that as such inspector inspecting cars, tendered to said Wabash Railway Company by defendant, for defective safety appliances and other defects, plaintiff was not within class of persons for whose benefit the Safety Appliance Act, or the rules or regulations, or the failure to inspect or discover required that the car be equipped with secure handholds and grabirons.

3. Further answering, defendant says that plaintiff was working for the Wabash Railway Company, a railroad corporation, as a car inspector in its yards located at or near Granite City, in the State of Illinois, and, on the occasion mentioned in his third amended petition, plaintiff was engaged in his duties as such car inspector, with respect to

cars tendered said Wabash Railway Company by defendant, [fol. 7] as was the custom relative thereto, to determine by inspection whether or not cars so tendered were defective as to safety appliances or otherwise; that as such inspector inspecting cars, tendered to said Wabash Railway Company by defendant, for defective safety appliances and other defects, plaintiff assumed the risks, hazards and dangers, which were usual, ordinary and incident to the work in which he was employed, of injury caused by defective handholds and grabirons and safety appliances and other defects on cars which his duties required him to inspect for the purpose of discovering defective safety appliances and other defects.

4. Further answering, defendant says that plaintiff was working for the Wabash Railway Company, a railroad corporation, as a car inspector in its yards located at or near Granite City, in the State of Illinois, and, on the occasion mentioned in his third amended petition, plaintiff was engaged in his duties as such car inspector, with respect to cars tendered said Wabash Railway Company by defendant, as was the custom relative thereto, to determine by inspection whether or not cars so tendered were defective as to Safety appliances or otherwise; and defendant says that whatever injuries plaintiff sustained, if any, were the result of his own carelessness and negligence as such car inspector in grabbing a handhold or a grabiron on a car, if he did so, without first testing and trying said handhold or grabiron to determine whether or not it was secure.

Wherefore, having fully answered, defendant prays to be hence discharged with its costs.

[fol. 8] On June 13, 1933, at the June Term of said Circuit Court, plaintiff, by leave of court, filed his reply to defendant's answer to plaintiff's third amended petition. Omitting caption and signatures, said reply is as follows:

REPLY

Comes now plaintiff in the above entitled cause and for reply to defendant's answer herein filed, denies each and every allegation of fact therein contained.

Wherefore, having fully replied, plaintiff prays for judgment in accordance with the prayer of plaintiff's third amended petition.

TRIAL

The trial of said cause was begun on the issues joined by the pleadings above set out in the Circuit Court of the City of St. Louis on November 20, 1933, at the September Term, 1933, of said Court, and the trial progressed and was laid over until November 21, 1933, all at the September Term, 1933, of said Circuit Court.

Said cause was tried before the Honorable O'Neill Ryan, judge of said court, presiding in Division No. 4 thereof, and a jury, and on November 21, 1933, at the September Term, 1933, of said court said trial was concluded.

VERDICT AND JUDGMENT

On November 21, 1933, at the September Term, 1933, of said Circuit Court, the jury in said cause returned a ver-
[fol. 9] dict in favor of plaintiff and against defendant in the sum of $15,000.00, which verdict was by the court received and filed and duly entered of record on said date; and thereupon, on the same date and at the same term of court, the court rendered and entered on its record a judgment in said cause in favor of plaintiff and against defendant in the sum of $15,000.00.

DEFENDANT'S MOTION FOR A NEW TRIAL

Thereafter, on November 22, 1933, at the September Term, 1933, of said Circuit Court, and within the statutory four days after the trial of said cause and rendition of said verdict and judgment therein as aforesaid, defendant filed its motion for a new trial in said cause in said court, the filing of which said motion on November 22, 1933, as shown by an entry of record of said court on said date.

DEFENDANT'S MOTION FOR NEW TRIAL OVERRULED

The aforesaid motion for a new trial was continued by order of the court, duly entered of record, from September

Term, 1933, to the December Term, 1933, of said Circuit Court. On December 26, 1933, at the December Term, 1933, of said court, the defendant's motion for a new trial was by said court overruled.

APPEAL GRANTED

Thereafter, on January 8, 1934, at the December Term, 1933, of said Circuit Court, defendant filed its affidavit for appeal in said cause in due form as shown by entry of rec-
[fol. 10] ord of that date. And the said Circuit Court of the City of St. Louis, on January 8, 1934, at the December Term, 1933, of said Circuit Court, by an order duly entered of record on that date, granted and allowed the defendant an appeal to the Supreme Court of Missouri.

TRANSCRIPT FILED IN THE SUPREME COURT

Thereafter, and within the time fixed by law, appellant filed with the Clerk of the Supreme Court of Missouri, a certified copy of the judgment and order granting said appeal, together with a $10.00 docket fee.

Bill of Exceptions

Thereafter, on June 14, 1935, at the June Term, 1935, of said Circuit Court, and within the time allowed defendant by law for filing its bill of exceptions in said cause, defendant's bill of exceptions by Honorable O'Neill Ryan, presiding in Division No. 4 of said Circuit Court at the time of trial and at the time of the filing of this bill of exceptions, was settled and allowed, approved, signed, sealed and ordered filed and was filed and made a part of the record in said cause; all of which was accordingly done as aforesaid and is shown by an order of said date, as well as by the file mark of said court endorsed on said bill of exceptions.

Be it Remembered, that at the February Term, A. D. 1933, of said court, and on, to-wit, the 6th day of February, A. D. 1933, the plaintiff filed in said court in said cause, in writing, his third amended petition, in the words and figures as follows, to-wit:

[fol. 11] IN CIRCUIT COURT, CITY OF ST. LOUIS, STATE OF MISSOURI

[Title omitted]

THIRD AMENDED PETITION

Plaintiff by leave of court files this his third amended petition and states that the defendant now and is, at all times herein mentioned was, a corporation duly organized and existing under and by virtue of law, and as such was engaged in the business of owning and operating a system of railroads as a common carrier of passengers, goods and freight for hire, by railroad, in interstate commerce, engaged in interstate commerce between the several states of the United States; that as such, in its said business, defendant operated, managed and controlled, moved and used cars, railroad equipment and appurtenances, used in interstate commerce; that defendant at all times did and now does business in the State of Missouri, with an office and place of business in the City of St. Louis, Missouri.

Plaintiff further states that on and prior to the 20th day [fol. 12] of November, 1927, he was in the employ of the Wabash Railway Company, a corporation, duly organized and existing under and by virtue of law, engaged in the business of owning and operating a railroad as a common carrier of goods, freight and passengers for hire in interstate commerce; that plaintiff was working for the Wabash Railway Company as a car inspector in its yards located at or near Granite City in the State of Illinois, and was engaged in his duties as such for said Wabash Railway Company in interstate commerce; that he and said Wabash Railway Company were then and there engaged in interstate commerce, and were engaged in and about the inspection of cars destined in interstate commerce, and cars having interstate freight therein, and to be further moved in interstate commerce, and plaintiff in the performance of his duties as such employe was required to go upon a freight car for the purpose of inspecting its equipment, to determine whether or not said car was to be accepted or rejected by his employer aforesaid; that in order to climb upon said freight car plaintiff used a ladder and grabiron or handhold that were then and there upon said car; that immediately prior to said time said freight car was placed upon the tracks there, it was hauled and moved by defendant and

tendered by defendant to the Wabash Railway Company equipped with an insecure grabiron or handhold on the roof of said car; that when plaintiff took hold of said grabiron, said grabiron became detached from said car, and plaintiff fell to the ground below and was injured as hereinafter mentioned, all of which occurred through violation of law [fol. 13] on the part of the defendant, and particularly the laws of the United States in such cases made and provided, and in violation of defendant's rules and regulations, and rules and regulations of the American Railway Association, adopted by and which were binding on defendant, which provided that cars, whether loaded or empty, having defects in violation of the Safety Appliance Acts, should not be offered in interchange.

And plaintiff further states that defendant did further violate the law in that defendant did negligently fail to inspect or discover said insecure handhold or grabiron prior to plaintiff's injury aforesaid, when in the exercise or ordinary care said insecure grabiron could and should have been discovered prior to plaintiff's injury aforesaid, and did negligently suffer and permit said grabiron or handhold to be and remain in the aforesaid insecure condition, when the defendant knew or by the exercise of ordinary care on its part would have known of its aforesaid condition, and when defendant knew, or by the exercise of ordinary care on its part would have known, that employees of the Wabash Railway Company would be required to go upon said car and use *said equipment, and that by reason* thereof there was danger of injury to said employees. And plaintiff states that as a direct result of the violation of law, as hereinbefore mentioned, plaintiff was seriously and permanently injured in this, to-wit:

Plaintiff's back, spine, sacral joints, chest, lungs, left hip, and the bones, joints, ligaments, nerves, tendons, tissues, membranes and vessels thereof, were seriously contused, wrenched, sprained, strained, swollen, inflamed and infected, dislocated and separated; that his head was bruised [fol. 14] and contused; that prior to the time of said injury plaintiff was not conscious of suffering with any disease or disability in the region of his back and spine, and that on account of said injury a dormant, pre-existing arthritis thereof was caused to become active and painful; and said arthritis did progress and become aggravated and dis-

abling; that plaintiff's head was bruised and contused; that his nerves and nervous system were severely shocked; that all of said injuries and the effects thereof are serious and permanent; that plaintiff has suffered and will in the future continue to suffer from headaches, nervousness, insomnia, loss of weight; that plaintiff has suffered, is suffering and will in the future continue to suffer bodily pain and mental anguish; that plaintiff has incurred and become obligated for medical attention in the sum of Five Hundred and Twenty Dollars ($520.00), and in the future will be required to expend sums for such purposes; that plaintiff has lost and will in the future continue to lose all or the greater portion of his wages and earnings; that at the time of his said injury plaintiff was earning approximately One Hundred and Seventy-Five Dollars ($175.00) a month; that plaintiff's ability to engage in any gainful occupation or to enjoy life has been seriously and permanently impaired and diminished; that plaintiff has been injured and damaged in the manner aforesaid in the sum of Forty Thousand Dollars ($40,000.00), for which sum, together with his costs, he prays judgment against defendant.

(Signed) Mark D. Eagleton, Attorney for Plaintiff.

[fol. 15] And be it remembered, that at the said February Term, A. D. 1933, of said court, and on, to-wit, the 10th day of February, A. D. 1933, said defendant duly filed in said court in said cause, in writing, its demurrer to the third amended petition (filed in vacation), which demurrer is in the words and figures as follows, to-wit:

IN CIRCUIT COURT, CITY OF ST. LOUIS, STATE OF MISSOURI

[Title omitted]

DEMURRER

Comes now the defendant herein and demurs to plaintiff's third amended petition for the following reasons:

1. Said petition does not state facts sufficient to constitute a cause of action against defendant.

[fol. 16] 2. Several causes of action have been improperly united in said petition.

T. M. Pierce, J. L. Howell, W. N. Davis, Attorneys for Defendant.

And be it remembered, that at the February Term, A. D. 1933, of said court and on, to-wit, the 27th day of February, A. D. 1933, the defendant filed in said court in said cause, in writing, its motion to require plaintiff to elect, in the words and figures as follows, to-wit:

IN CIRCUIT COURT, CITY OF ST. LOUIS, STATE OF MISSOURI

[Title omitted]

MOTION TO REQUIRE PLAINTIFF TO ELECT

Comes now the defendant and moves the Court to require plaintiff to elect as to his third amended petition for the following reasons:

[fol. 17] 1. Because several distinct alleged causes of action are improperly united in one count in said petition.

2. Because several causes of action have been improperly united in said petition.

3. Because there has been united in said petition a cause of action alleging a violation of the Safety Appliance Act based on the law of the United States and causes of action involving the common law based on the law of a State.

4. That said causes of action in said petition are inconsistent with each other.

5. That the Court has not jurisdiction of causes of action in the same count of the petitions, some of which are based on the law of the United States, and others which are based on the common law and the law of the State.

T. M. Pierce, J. L. Howell, W. N. Davis. (Signed)
Walter N. Davis, Attorneys for Defendant.

And be it further remembered, that at the said February Term, A. D. 1933, of said court, and on, to-wit, the 27th day of February, A. D. 1933, said defendant filed in said court in said cause, in writing, its motion to strike out, in the words and figures as follows, to-wit:

[fol. 18] IN CIRCUIT COURT, CITY OF ST. LOUIS, STATE OF MISSOURI

[Title omitted]

MOTION TO STRIKE OUT

Comes now defendant and moves the Court to strike out the following portion of plaintiff's third amended petition, to-wit:

Commencing with the words "and in violation of defendant's rules and regulations" on page 2 and in line 7 from bottom and ending with the words "should not be offered in interchange" in lines 2 and 3 from the bottom of said page, the part to be stricken out being as follows: "and in violation of defendant's rules and regulations, and rules and regulations of the American Railway Association, adopted by and which were binding on defendant, which provided that cars, whether loaded or empty, having defects in violation of the Safety Appliance Acts, should not be offered in interchange."

And commencing with the words "And plaintiff further" on page 2, last line, and ending with the words "injury to [fol. 19] said employees" on page 3, line 13 from the top, the part here moved to be stricken out being as follows, to-wit: "And Plaintiff further states that defendant did further violate the law in that defendant did negligently fail to inspect and discover said insecure handhold or grabiron prior to plaintiff's injury aforesaid, when in the exercise of ordinary care said insecure grabiron could and should have been discovered prior to plaintiff's injury aforesaid, and did negligently suffer and permit said grabiron or handhold to be and remain in the aforesaid insecure condition, when the defendant knew or by the exercise of ordinary care on its part would have known of its aforesaid condition, and when defendant knew, or by the exercise of ordinary care on its part would have known, that employees of the Wabash Railway Company would be required to go upon said car and use said equipment, and that by reason thereof there was danger of injury to said employees."

And defendant says that plaintiff has intermingled and united in said petition several causes of action improperly, a portion of which are cognizable under the laws of the United States and the portion cognizable under the common law and the laws of the State; that said petition is based on

a violation of the laws of the United States; and that the above portions of plaintiff's petition do not state facts constituting any cause of action against defendant.

T. M. Pierce, J. L. Howell, W. N. Davis, (Signed)
Walter N. Davis, Attorneys for Defendant.

[fol. 20] And thereafter, at the April Term, A. D. 1933, of said court, and on, to-wit, the 24th day of April, A. D. 1933, said demurrer and motion to strike and to elect, all directed to third amended petition, overruled by the court.

And on the overruling of said motion to strike, and so forth, the Court filed a memo in the words and figures as follows, to-wit:

IN CIRCUIT COURT OF THE CITY OF ST. LOUIS, STATE OF MISSOURI

[Title omitted]

MEMO ON MOTION TO STRIKE OUT

This motion to strike out paragraphs two and three of defendant's answer (filed May 19, 1933), to plaintiff's third amended petition, was argued at length Friday last by Mr. Aschemeyer, for plaintiff, and Judge Davis, for defendant, and the Court then stated it would overrule the motion, but at Mr. Aschemeyer's suggestion promised to file a memo, setting forth the Court's views, then expresed, as to why the motion to strike, as to the third paragraph, was overruled. No objection was made to overruling the motion as [fol. 21] to the third paragraph, which raises a question of law that really arises on the petition, as it charges plaintiff was an inspector of cars for the Wabash Railway Company and engaged in his duties as such inspector at the time he was injured. The Court, as stated to counsel, is of the opinion assumption of risk is not a defense in this case, which is bottomed on a violation of the Federal Safety Appliance Act, and common law negligence, because (a) in no event could it be a defense under the Federal Act, and (b) it is only a defense against a common law charge of negligence if the relation of master and servant exists. Judge Davis admits the former (a) and does not seriously, if at all, question, the latter (b) statement but thinks, under what he regards as the peculiar facts in this case, that that question,

of assumption of risk, is in this case, and, he believes if this motion is sustained he cannot have the question reviewed by an appellate court; that by going on he waives the point, and a term bill of exceptions would be of no avail. If Judge Davis is right about that the Court is of opinion defendant should not be deprived of the right, if its exercise becomes necessary, to have the question considered by a higher court, and that the better course to pursue is to now overrule the motion to strike, and when the case is tried defendant can offer instructions on the asumption of risk theory, which, if refused by the trial court, will undoubtedly make the question reviewable.

The motion to strike is in its entirety overruled.

(Signed) O'Neill Ryan, Judge Division No. 4.

June 5, 1933.

[fol. 22] (Copies of this sent to Mr. Aschemeyer and Judge Davis.)

To which ruling of the Court, in so overruling defendant's demurrer to plaintiff's third amended petition, defendant, by its counsel, then and there objected and excepted, and still continues to object and except.

And thereupon, the defendant, by its counsel, duly objected and excepted to the action of the Court in so overruling defendant's motion to strike out and to require plaintiff to elect.

IN DIVISION NO. 4 OF THE CIRCUIT COURT OF CITY OF ST. LOUIS

[Title omitted]

Statement of Evidence

Be it Remembered, that at the October Term, A. D. 1933, of the above entitled court and on, to-wit, beginning on the 20th day of November, A. D. 1933, the above entitled cause came on for trial and was tried in the above entitled court before the Honorable O'Neill Ryan, Judge of said court, and a jury, and the following proceedings were had, to-wit:

[fol. 23] APPEARANCES

For Plaintiff—Mark D. Eagleton, Esq., and Frank F. Aschemeyer, Esq. (By Mark D. Eagleton, Esq.)

For Defendant—Walter N. Davis, Esq.

Plaintiff's Evidence in Chief

The plaintiff, to support the issues in his behalf, offered and introduced the following evidence, to-wit:

THOMAS J. BRADY, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified, on behalf of plaintiff, as follows:

Direct examination.

Questions by Mr. Eagleton:

Q. What is your name?
A. Thomas J. Brady.
Q. How old a man are you now?
A. Thirty-seven years old.
Q. You were injured, I believe, six years ago today, November 20th, 1927?
A. That is right.
Q. All right. What time of the day or night were you injured?
A. About 9:30 or 10 o'clock.
Q. In the evening?
A. In the evening; yes, sir; it was dark.
Q. Where were you working at the time you were injured?
A. Working for the Wabash Railroad Company, at Granite City.
Q. And how long had you been working for the Wabash Railroad Company then?
A. About three and one-half years.
[fol. 24] Q. And how long had you followed railroading before that?
A. About eighteen years.
Q. Ever since you were a young man or a boy?
A. Yes, sir; when I was seventeen years old.
Q. Now, what was the kind of work you were performing?
A. I was classed as an inspector.
Q. And what were you earning for the last year or so, or two, before this accident occurred, from the Terminal?
A. About $175.00 a month.
Q. You lived, I believe, in Granite City with your family, some place close to this place of accident?
A. I did at that time; yes, sir.
Q. Now, at the time you were injured, I believe that you were engaged in inspecting some cars which were on what

we have referred to at other times as an inbound track; is that right?

A. That is correct.

Q. That is a track that the Wabash Company has in its yards there?

A. Yes, sir; Wabash yards.

Q. And I believe its number is No. 11?

A. Yes, sir; No. 11.

Q. This track No. 11, in a general way, runs east and west; is that correct?

A. Yes, sir; that was the direction it ran, east and west.

Q. And, at the time you were making your inspection of those cars, there were no engines, or locomotives, attached, were there?

A. No, sir; there was not.

Q. And which side of the cut of cars were you making your inspection upon?

A. I was on the south side.

Q. And who was working with you?

A. An inspector by the name of Frank Rhine.

[fol. 25] Q. And he also was an employee of the Wabash?

A. Yes, sir.

Q. And for what purpose were you making that inspection?

A. The purpose of the inspection was to determine whether or not the cars were to be accepted by the Wabash.

Q. By whom—I presume that it is admitted that the cars were delivered by the Terminal Railroad?

Mr. Davis: Yes, sir.

Mr. Eagleton (continuing):

A. Those cars were delivered some two or three hours before by the Terminal Railroad Association?

A. (By the witness): Yes, sir.

Q. And when they brought the cars over—that was the last admission—they brought them over from St. Louis, Missouri?

A. Yes, sir.

Q. And they brought them over to those inbound tracks in Granite City, Illinois. And I believe you said, at the last trial, that would be a pull of some eleven or twelve miles, would it?

A. Yes, sir.

Q. Now, in making your inspection, if you found that the equipment was in good and safe condition to permit it to continue its journey, what would you do?

A. If it was in condition to continue its journey, the car would be marked, carded.

Q. And, if it was in such condition, what would be done?

A. Brought back by the Terminal.

Q. Now, is which direction were you working on the south side of the track, east to west, or west to east?

A. Working from east to west.

Q. How many cars were there all told in this cut, about?

A. Between 50 or 60 cars in the drag.

[fol. 26] Q. And about how many of them had you inspected when you were hurt?

A. 35 or 40 cars.

Q. You had inspected all the necessary parts on your side, which was the south side, and Rhine took care of the north side, did he?

A. Yes, sir.

Q. And how did you work with reference to the roofs of the cars?

A. We would alternate; I would go up on one car, and Mr. Rhine would go up on the next.

Q. Then, in reference to the roofs, you would inspect every other car and he would do the same?

A. Yes, sir.

Q. The particular car upon which you were working at the time you were injured, was Wabash No. 76085?

A. Yes, sir.

Q. And where were you at the time you were injured—where were you standing and what were you doing?

A. At the time I was injured, I was going up to inspect the roof of this Wabash car, and, when I got up to the top, going up the ladder, I flashed my light along the side ladder to see if they were in good shape and, when I got up to the top, I got hold of the top iron to pull on it and, when I pulled on the top grab iron, it felt firm and solid, and when I started to go up on top of the car and put my weight on it the whole ladder pulled off and fell to the ground.

Q. Which end of the car were you on, as far as this 76085 was concerned?

A. That would be the south corner.

Q. The ladder you are speaking of, was that what we call a side ladder or an end ladder?

A. The side ladder.

Q. So that if we had a box car in front of us here you have [fol. 27] two ends and maybe you have two sides to the car; is that right?

A. That is right.

Q. This ladder was upon the side of the car?

A. That is right.

Q. And the ladder, what is it made of?

A. It is made of wrought iron rods, and fastened on with bolts.

Q. Well, the wrought iron rods that we ordinarily refer to as hand-holds or grab irons?

A. Yes, sir.

Q. They are the same thing?

A. Yes, sir.

Q. And, when you are going up the side on the ladder, that iron you put your hand on is the same iron that you put your hand on ahead?

A. Yes, sir.

Q. There is a series of them spaced conveniently so as to go to the top, is that right?

A. Yes, sir; spaced 18 inches apart.

Q. And what is the length of the grab iron?

A. 18 inches long.

Q. And what are they made of, with reference to the thickness of the iron?

A. Five-eighths to three-fourths of an inch.

Q. Now, you say that when you went upon this particular ladder, your purpose was to go to the top of the car and inspect the roof?

A. Yes, sir.

Q. What devices are there on the top of the roof to inspect?

A. You have to inspect the longitude of the running board and the longitudinal of the running board and the track and the foot board where you go on.

Q. You said "longitudinal" board twice. Do you mean longitude and latitude?

A. Yes, sir.

Q. When you get on this board, running board, what do you do with reference to your ladder?

[fol. 28] A. Flash the light along the grab iron to see if the nails were on it.

Q. Where do you carry your lantern?

A. Carry my lantern in the left hand.

The Court:

Q. What hour was this?

A. Between 9 and 10 o'clock in the evening.

Mr. Eagleton (continuing):

Q. How far in from the side of the car does your grab iron set, your top grab iron?

A. Between 12 and 14 inches.

Q. And is that grab iron made of the same kind of material we have been speaking of?

A. Wrought iron.

Q. Does that foot turn and have a hole in it for a bolt?

A. It runs parallel with the length of the car, this particular grab iron does, and there is one grab iron that runs lengthwise and one which runs cross-wise.

Q. Well, the one that you took hold of on the top was the one that ran parallel with the top of the car?

A. Yes, sir.

Q. And all the grab irons are made practically alike, with respect to length and thickness?

A. Yes, sir.

Q. Now, you say this particular grab iron had what is known as feet to attach it to the side of the car?

A. Yes, sir.

Q. This latitudinal running board, where is that connected?

A. It is connected to the longitudinal running board on the length of the car; it is about 6 inches back of the end of the car and extends over the side of the car 6 inches back from the end.

Q. How big is the latitudinal running board in size—how wide and long?

[fol. 29] A. About 3 feet long and 2 feet, 6 inches wide.

Q. What is it made out of?

A. It is made out of one-inch boards connected on by 2 x 4 over-studding.

Q. Now, as I understand it, as you go up the side of the car the latitudinal running board is that running board which

runs from the side of the car to the longitudinal running board which is in the center?

A. That is right.

Q. The longitudinal board gets its name from the fact that it runs down the center of the car?

A. That is right.

Q. Now, which way do the boards run on the latitudinal running board, the boards that are placed on there, do they run with the length or with the width?

A. They run with the length of the car.

Q. Approximately, how wide are those boards that are placed on there?

A. Between 5 and 6 inches wide.

Q. And about how many boards does it take in width to make the latitudinal running board?

A. About 7 boards—between 5 and 7 boards.

Q. Now, this grab iron on the top, it is actually attached to the latitudinal running board, is it?

A. Yes, sir.

Q. And what sort of boards are placed on the feet of the grab iron, in order to secure it to the latitudinal running board?

A. It is secured to the latitudinal running board with straps of iron and half-inch bolts. The bolts are down and the heads are down under the *the* running board.

Q. When you speak of "straps of iron," are those straps of iron—where are they attached?

[fol. 30] A. The straps of iron are attached to the longitudinal running board.

Q. Now, the place I am speaking of now is the grab iron itself, that is, the top grab iron you took hold of on this occasion. How many bolts did it have on either side?

A. The grab iron has one bolt on either side.

Q. And what is on top of the bolt to hold it back?

A. It is fastened down on top with a half-inch nut, which comes down on top of the foot of the grab iron.

Q. And what is at the bottom of it?

A. It has a washer attached—do you mean the grab iron—is attached on to the 6-inch boards that run lengthwise of the car.

Q. What is the height or stature of those bolts that are attached to the grab iron on the longitudinal running board?

A. About 2½ inches.

Q. In height?

A. In height.

Q. When they were in their proper places attached in the proper manner securely, how much of that bolt do you see above the place itself attached to the latitudinal running board?

A. Its place ain't over a half-inch square nut, and a quarter of an inch above that for the hooking or bradding tool.

Q. I assume, from what you say, that this nut is attached to the top of the bolt on threads, is it?

A. Yes, sir.

Q. One nut for each bolt?

A. One nut for each bolt.

Q. And the only thing that would be exposed would be the nut on the top and a quarter of an inch sticking above that over the nut itself; is that right?

A. That is right.

Q. Now, the other thing we were speaking of a minute ago [fol. 31] was, where the latitudinal running board joins to the long running board there is an iron strap passes underneath, is that correct?

A. That is correct.

Q. On either side of the latitudinal running board?

A. That is right.

Q. And then there is a bolt running down, that is, through the thickness of the latitudinal board, with a nut at the bottom?

A. That is right.

Q. And they are the same appearance as the other two bolts you are speaking of?

A. Yes; but you have to get on top of the car in order to see them.

Q. Now, you say when you took hold of it you felt of it to determine whether or not it was firm enough for you to put your weight on it?

A. Yes, sir.

Q. And how did it feel?

A. The grab iron at first felt firm when I took hold of it and, when I put my weight on the latitudinal running board pulled off at the back end.

Q. Now, at this place where it pulled off at the back end, did you see that ladder while you were there?

A. Yes, sir.

Q. And the back end you are speaking of is the end that is over at the center of the car where it is attached to the longitudinal running board?

A. That is right.

Q. And what was its condition?

A. The condition was old and rotten, where it came down.

Q. And what is the character of the wood which came down with it?

A. It was old and rotted out.

Q. Now, those bolts that you have been speaking of were originally down through the latitudinal running board and they came down with the running board, did they?

[fol. 32] A. They did come down when the part of the running board had pulled off.

Q. What was their condition, with reference to the running board that came down?

A. The wood was old and worn out and rotted around the bolt at the top.

Q. Now, this rotted condition of the board, to what extent was that rotted out—was it all at one place, or where?

A. It was all over the whole length of the running board, where it was rotted out.

Q. Was that something that you could see from the top?

A. Yes, you could see that from the top of the car.

Q. Was it something that could be seen plainly, or not?

A. It was in plain sight.

Q. That is not—I am speaking when you had this running board down, after the accident, you could see it by looking at it?

A. Yes, you could see it then.

Q. When you were going up, was this in a place where you could see it?

A. No, when you were going up the side, you couldn't see it, not until you got to the top of the car.

Q. In any event, you would have to go the entire length of the ladder and then get to the top of the car, then you could see it?

A. Yes, sir.

Mr. Davis: I object to what he could have seen up there.

The Court: The objection to that is sustained.

Mr. Davis: And the jury be instructed to disregard that?

The Court: Disregard that answer, gentlemen.

Mr. Eagleton (continuing):

Q. If you had not been injured—the point I want to get [fol. 33] at is this: if you had not been injured, what is the next thing you would have done by way of investigating it?

A. The next thing I would have done, when I got on top of the car, was to have pointed my light around the bolts, around the grab iron, and then to inspect the latitudinal running board and the longitudinal running board, to see if they were in good shape.

Q. This particular latitudinal running board, at the place where it was joined to the longitudinal running board and the place you say it was rotted off, would be how far back from the side of the car—how many inches back from the side of the car toward the center would it be when in position?

A. It would be between 3 and 4 feet back from the side of the car.

Q. When you were speaking about this thing being in plain sight, you mean it was so rotted that it would show plainly on top?

A. Yes, sir; but I didn't get to see it until after I fell to the ground.

Q. And from what side were you looking at this running board then, with reference to its top or the underside?

A. I was looking at the top side.

The Court: This is the latitudinal running board you are speaking of?

A. Yes, sir.

Mr. Eagleton (continuing):

Q. When you fell, what part of your body did you land on?

A. Landed on my back.

Q. And what was done with you, after the accident?

A. I was taken to the Granite City Hospital right after the accident, in about half an hour or an hour after the accident.

Q. And how long did you remain there, approximately?

A. Two or three weeks.

Q. And what was done with you there, in a general way—[fol. 34] what part of your body was treated?

A. My body, around my back, was bandaged up and my hip was treated.

Q. Which hip?

A. The left hip was treated also.

Q. What was the matter with the left hip?

A. It was bruised and cut.

Q. On which side, the back side or——

A. The back side and all along the side where the cinders rubbed it.

Q. As, after you got home, when was it that you first went back to work and back to your employment?

A. It was about three or four days after I came home, they came up after me in a car and took me back to the Wabash office, and there I sat at a desk a few hours a day and went—they took me back home and they left me back every day.

The Court:

Q. When was this?

A. It was about a week after the accident—no, I beg your pardon, that was after I was in the hospital.

Q. I am trying to fix the time. When did you go out of the hospital?

A. I don't remember the date.

Mr. Eagleton (continuing):

Q. You say it was about two weeks?

A. About two weeks after the accidest.

Q. Now, how long did this continue that you would be taken to the office and permitted to remain there for several hours and then be taken home again—how long did that continue?

A. It was over a month and possibly two.

Q. And during all that time were you still receiving treatment from the doctor?

A. I was still under treatment from the Wabash doctor at Granite City.

Q. What was the condition of your back at that time, with [fol. 35] reference to any pain?

A. I suffered pain up in the middle of the back, and my hips were bruised. I suffered pain there every day. I had trouble getting up and down.

Q. Did you use anything during that period of time to support you or assist you in walking?

A. I used a cane.

Q. During the time you would be at the Wabash office, would you have to perform any of your regular duties as inspector?

A. No, I was not required to do any work at all.

Q. Did you make any improvement in your condition at that time that you were under the care of this company doctor?

A. No, I never improved at all. I got worse all the time.

Q. And whose treatment did you take up next?

A. I took up treatment with Doctor Meinhardt.

Q. And how did you come over to him?

A. An acquaintance of mine by the name of Green brought me over in his automobile.

Q. And what was the general nature of the treatment he gave you?

A. He gave me electrical treatment on the back, massages of the back.

Q. And have you been under his care since that time?

A. I have been under his care continuously since that time.

Q. With reference to your weight, how much did you weigh at the time you were hurt?

A. I weighed 155 pounds at the time.

Q. And what was the weight you went down to during your spell—spell of illness?

A. At one time I weighed 115 pounds.

Q. And, I believe, during that time, or about that time, [fol. 36] the doctor ordered you to leave the city for a while?

A. Yes, sir; at that time the doctor advised me to go out west.

Q. And where did you go?

A. I went to Western Texas.

Q. And about when was that?

A. That was in the summer of 1929.

Q. How long did you remain there?

A. I was out there for a year, about a year and a half.

Q. Aside from that time that you were away from the city, you have been in that vicinity ever since the accident?

A. Yes, sir.

Q. Did you do any work before you went away, of any kind?

A. No, I never worked any before I went away.

Q. And since the accident, I believe, you worked some on a truck didn't you?

A. Yes, I worked a few days, off and on, on a vegetable truck.

Q. How many days did you work?

A. About fifteen days.

Q. And was that all the work you did since the accident occurred?

A. That is practically all the work I did since the accident.

Q. When you were trying to work as—or did work on this truck, what effect did it have on your spine?

A. I became nervous and my back hurt, and I was required to use more treatments at home.

Q. During all that time, did you have this brace on?

A. Yes, sir; I wore the brace all the time.

Q. What kind of a brace is that?

A. It is a brace composed of canvas and leather strips.

Q. You still wear the brace, do you?

A. Yes, sir; I wear the brace all the time.

[fol. 37] Q. Did you ever have any difficulty or pain or inconvenience or discomfort of any kind in your back or any other part of your body before this accident?

A. No, sir.

Q. With reference to working steadily, did you or not work steadily?

A. I worked steadily most of the time. I worked seven days a week while working for the Wabash.

Q. Including Sundays?

A. Including Sundays.

Q. Was that work that required you to be active and up and down on the cars?

A. Yes, sir; you had to be on the go all the time.

Q. And, with reference to your ability to do much work, did you get around quickly and satisfactorily?

A. Yes, sir. I was satisfactory to the Wabash and got along all right.

Q. With reference to the grab iron itself, where it was attached to the latitudinal running board, did you look at it after the accident?

A. The grab iron?

Q. Yes.

A. It was down on the ground.

Q. What had happened with it, was it still attached at both ends, or how?

A. It was only attached at one end, and the far end had a hole and was all rotted out at the hole, at the stem of the bolt.

Q. Which end would that have been that was pulled out?

A. That would be the right-hand side that was pulled out as I went up the ladder, at the east end.

Q. How big was that hole that was rotted out?

A. It was a quarter of an inch or more outside the stem of the bolt.

Q. What was the character of the hole?

A. The hole was rotted out, it was old and rotted.

Q. In looking at that as you had it in front of you, could [fol. 38] that hole be seen plainly from the top side?

A. It could be seen plainly from the top side, it was in plain view.

Mr. Davis: That was after it got down.

Mr. Eagleton (continuing):

Q. What is the general nature of the treatment you have been receiving from Doctor Meinhardt since the accident—I mean recently?

A. The last two times I have been out there, he has been giving me electrical treatments to the back.

Q. Have you made an effort to go without your cane?

A. At times I have, yes; I would go two or three days at a time, but I find I cannot get along without it.

Q. What happens when you go without it?

A. I get jerky and I make a quick step, and cannot get around as well.

Q. Where do you have your pain now?

A. In the middle of the back and down close to the hips and up under my shoulder blades.

Q. You have been examined, I believe, by Doctor Will in 1929—that is, around February, 1929—and again, I believe, in September, 1933, by the same doctor?

A. Yes, sir.

The Court: When was the first examination?

Mr. Eagleton: February 18th, 1929, and September 26th, 1933, Your Honor.

Mr. Eagleton (continuing):

Q. On this particular car, or any of those cars, that you were working on previous to the time you went to work, had they been accepted by the Wabash at all?

A. No, sir; they had just been placed there and had not been accepted.

[fol. 39] Q. And that applies to this particular car?

A. Yes, sir.

Mr. Eagleton: I believe it will be admitted by the defendant that this particular cut delivered previously by the Terminal, the defendant, contained cars that were destined in interstate commerce; is that right?

Mr. Davis: I won't agree to it, but if you stipulate it, that it is a fact, then I will agree to it. I am not going to admit anything, Your Honor, unless he stipulates.

The Court: Well, then, put it in the form of an agreement.

Mr. Eagleton: Well, it may be agreed between counsel that those cars which were delivered to the Terminal Railroad some time previous to the accident contained cars that were moving in interstate commerce?

Mr. Davis: Yes, sir.

The Court: Now, are those the cars that were being inspected that night?

Mr. Eagleton: Yes, Your Honor; and I offer this 76085, this Wabash car, that you were injured while you were working on, was one of those cars, was it?

A. (By the witness): Yes, sir.

The Court: That is to say one of the cars being used in interstate commerce?

Mr. Eagleton: Well, it was one of the cars that was attached to the cars used in interstate commerce, isn't that it?

Mr. Davis: My understanding is that all those cars were taken over from St. Louis, Mo., to Granite City, Ill., the whole train of cars were.

[fol. 40] Mr. Eagleton (continuing):

Q. What I want to get at, Mr. Brady, there wasn't any movement of the cars afterwards—they hadn't been broken up before your inspection.

A. No, sir; they were just left as they came in and were still coupled together.

Q. They were still coupled together?

A. Yes, sir.

The Court: Now, I understand your agreement is that the string of cars that were sent over by the Terminal, and which were being inspected that night by this plaintiff and Mr. Rhine, and of which this car Wabash 76085 was one, were all still attached at the time of this inspection, and that among that string, were cars that were moving in interstate commerce?

Mr. Eagleton: That is correct.

The Court: Does that cover it?

Mr. Davis: Had been used in interstate commerce in St. Louis and were taken over to Granite City.

The Court: I don't understand that.

Mr. Davis: They had been cars that had been used in interstate commerce.

Mr. Eagleton: Well, I take it that there were still shipments in there that were being moved in interstate commerce?

Mr. Davis: I think that's true.

Mr. Eagleton: That was the admission at the last trial.

Mr. Davis: My admission was that those roads were engaged in interstate commerce.

The Court: I understand that, but this string of cars, I understand——

Mr. Davis (interrupting): Well, they had moved from St. Louis, Mo., to I think, Granite City, Illinois, and, as I understand, this man was inspecting them for the Wabash [fol. 41] Railroad Company. Where is that admission of the last trial?

Mr. Eagleton: We served notice on Mr. Davis to produce the record of the cut of cars, that is, all of those cars were going out there from the State of Illinois. I will give you the admission.

Mr. Davis: We have the notice to produce, Your Honor, but that wasn't among the cars that I know of.

Mr. Eagleton: Here is the admission on page 43 of the transcript. I will read this admission. I think it will clarify this situation. The admission was this, by Judge Davis——

The Court: Is that the present admission now?

Mr. Eagleton: But this is to be the approved agreement between parties.

The Court: That is quite right.

Mr. Eagleton: That this was a car included in about fifty cars in a cut delivered by the Terminal Railroad Association and which came over to East St. Louis and Granite City, and were placed on the receiving track, that is the inbound track of the Wabash Railroad Company; among those cars were cars destined to foreign cities located in states other than the State of Missouri and the State of Illinois.

Mr. Eagleton: If the Court please—it will save a little time—I have two doctors I see here now—I am almost through with the plaintiff now. May I put them on now?

The Court: Is that agreeable to you, Judge Davis?

Mr. Davis: Yes, Your Honor.

Witness excused temporarily.

[fol. 42] Doctor Victor J. Meinhardt, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified, on behalf of the plaintiff, as follows, to-wit:

Direct examination.

Questions by Mr. Eagleton:

Q. Will you please state your name to the Court and jury?

A. Doctor Victor J. Meinhardt.

Q. What is your business or profession?

A. Physician and surgeon.

Q. Of what medical school are you a graduate?

A. St. Louis University.

Q. What year?

A. 1923.

Q. Where do you office, Doctor?

A. Grand and Hebert, St. Louis.

Q. You have lived in the City of St. Louis all your life?

A. Thirty-nine years.

Q. Did you have occasion to examine and treat the plaintiff in this case?

A. I did.

Q. When did you first begin your treatment, about?

A. I think he came to my office, it was in January, 1928, I think about the 10th, the early part of January.

Q. This injury occurred, according to the allegations here, on the 20th of November, 1927. This would be the January following that injury, would it?

A. About two months.

Q. Now, will you tell us what his condition was, about that particular time, as revealed upon examination?

A. He had a large amount of tenderness over the entire back, extending from the lower part of the shoulders down [fol. 43] to the hips, and the muscles of those regions were tender on pressure, or palpation; the muscles were rigid, somewhat tender and board-like. He was very nervous. He at that time, I think, weighed about 145 to 150 pounds, and he complained of headaches, pain in both hips, inability to stoop or bend over and, when he did move around, he said his back became worse. That was the first examination.

Q. Now, what was the nature of the general treatment you prescribed?

A. The treatment I gave him consisted of rest and heat treatment to the back. At first, I gave him massage treatment for those muscles which were tense and board-like, and told him that he should rest as much as possible at home, to sort of immobilize the spine, keep the joints of the spine at rest. It was necessary at that time to give him liniments for his hips, and also sedatives to take at home so that he could rest and sleep.

Q. With reference to his back, what sort of applications did you put to his back?

A. In the early part of my treatment, I taped his back with adhesive tape, and the tape extended from below the shoulders down to the hip region. I kept it on for about one, two or three months; after that time, I suggested that he get a supportive corset belt to maintain the spine in a rigid position, and during the treatment, while he was under my treatment, he has had two or three belts.

Q. Doctor, I believe you took some X-ray pictures of his back, did you?

A. Yes, sir.

Q. And you brought those X-ray pictures to court when this original case was tried in 1929?

A. Yes, sir; the old Court House.

[fol. 44] Q. Have you since that time located or been able to find your pictures?

A. I left those pictures in the court, and I haven't seen them since.

Q. You have received, I believe, copies of reports from Doctor Peden, who took X-rays after that time?

A. Yes, sir.

Q. Doctor Peden is an X-ray specialist?

A. Yes, sir.

Q. The Court: And those X-rays spoken of are not available now?

Mr. Eagleton: Apparently not, but we do have the other groups, I think.

The Court: Very well.

Mr. Eagleton (continuing):

Q. What are you treating him for now—I mean, what is the condition of the man's treatment at the present time, from the recent tests?

A. You mean the diagnosis?

Q. Yes, sir.

A. My diagnosis is a hypertrophic arthritis of the spine.

The Court: Now, reduce that to language we can all understand, Doctor.

A. Well, that is a condition of the spine in which we have a projection of bone, that is, there is a bony growth occurs —it is abnormal—and it occurs along the edges of the bones. But, in his case, he shows a projection of bone in the spinal vertebra that is abnormal and it is growing between the vertebra. My treatment for this condition is such that I am waiting for that condition to become solid. At that time there won't be much to do for him medically.

Mr. Eagleton (continuing):

Q. When you say you are "waiting for the condition to become solid," what to become solid?

A. The spine is made up of vertebra. As this condition [fol. 45] begins to grow the top and the bottom come together, so sometimes the top of one will grow to the bottom of the other. At that time the bones will be fused or ankylosed, meaning they will be stiff, there will be no joints there.

Q. In what vertebra is that found to have taken place, if there is such?

A. Between the tenth and eleventh vertebra, which would correspond with the tenth and eleventh ribs.

Q. Where are they located?

A. They are located just about the middle of the back.

Q. Upon clinical examination, what evidence, if any, did you find that such ankylosis had taken place?

A. At this time?

Q. Yes.

A. At this time there is a pointing backward of the spine at this point, that is, the spine ankylates backward. It is located in this region of the tenth and eleventh dorsal vertebrae. At this time he also has a curvature of the spine to the left. This curvature I think, is a congenital thing, that is, the curvature has come on because of the stiffness of the spine.

Q. Doctor, I think there will be some evidence in the case that about two weeks after his accident an X-ray picture was taken which shows some arthritic evidence, or deposit, sufficient to show in an X-ray picture of the ninth, tenth, eleventh and twelfth dorsal vertabrae. A picture which would disclose that two weeks after the accident, that character of arthritis couldn't, I take it, be produced by the accident in question, could it?

A. That would be too soon after the injury to say that that was due to the injury.

Q. Now, when you have a condition of the kind that I [fol. 46] have just described and you get a trauma or blow to the spine, what happens to that condition under those circumstances?

Mr. Davis: I object to that, Your Honor. He hasn't asked any question of opinion of the Doctor, or anything else.

The Court: How is that?

Mr. Davis: He hasn't asked the Doctor for his opinion at all.

The Court: He isn't to say——

Mr. Davis: No; he asked him what happens.

The Court: Well, I gather that is to inquire his opinion of the matter. Isn't that true?

Mr. Eagleton: Yes.

The Court: Suppose you make it more specific.

Mr. Eagleton (continuing):

Q. What did you find in this particular case, if anything, the blow or fall had done with reference to that particular arthritic condition, which antedated the date of the injury in this case?

Mr. Davis: That is not a hypothetical question.

The Court: I rather think you had better put the question—that is not admissible.

Mr. Eagleton (continuing):

Q. Did you find any evidence, since you began treatment of this man, of any increased deposits of an arthritic nature in this back at the juncture of the tenth and eleventh vertebrae—did you find it?

A. Yes, sir.

Q. What part, if any, does the trauma or blow play in causing that character of injury?

Mr. Davis: We object to that question, it conveys no information to the jury; it is speculative and conjectural.

[fol. 47] The Court: You are not making it sufficiently clear to the Court.

Mr. Eagleton: Maybe I could reframe that a little better.

The Court: Very well.

Mr. Eagleton (continuing):

Q. Assuming that this man on the 20th of November, 1927, prior to, his receipt of this fall was not suffering any pain or discomfort or inconvenience, but he had this arthritic deposit which antedates the injury, and assuming that he received a fall whereby he fell some distance of 10 or 12 feet and alighted on his back on the ground below. Now, on that assumption, and, further, assume that after that time he immediately began to suffer pain in his spine, both in the middle of the back and above and below, then I will ask you your judgment or opinion what, if anything, that particular fall had to do with this arthritic condition which you mentioned you found?

Mr. Davis: I object to that question again. It conveys to the jury no information at all with respect to this condition, and it calls for a conclusion of the witness and it is speculative and conjecture.

The Court: Are you able to show what the degree of arthritis was on the 20th of November, 1927, Mr. Eagleton?

Mr. Eagleton: I submit that degree that he had was not causing him any pain or disability, but since the accident it was giving off pain and causing the kind of disability he found.

The Court: I think he should be allowed to answer that. If I understand your question, it is that this man had arthritis in this region on the 20th of November, 1927, the date [fol. 48] of this accident. Do you know how long it existed?

Mr. Eagleton: No, except that it existed sufficient to show in the X-ray picture some deposit.

The Court: Well, include that in your hypothesis and, however, that it caused the plaintiff no pain or discomfort; is that true?

Mr. Eagleton: Yes, sir; that is true.

The Court: And immediately following the accident pain existed in this region and discomfort existed in this region?

Mr. Eagleton: That is right.

The Court: If there was, however, that pain or discomfort was consequent upon this accident?

Mr. Eagleton: That is right.

The Court: Now, what is your objection?

Mr. Davis: My objection is that it conveys no information to the jury at all, and it is a conclusion and conjecture.

The Court: Overruled.

To which action of the Court, the defendant, by its counsel, then and there at the time duly objected and excepted, and still continues to object and except.

Mr. Eagleton (continuing):

Q. You may answer the question, Doctor.

A. This man showed the evidence of a bony growth in his spine, as I remember, from the last trauma previous to this accident, and my examination and a further examination by Doctor Peden of his X-rays it is clearly shown that this new projection of bone has increased. In a general way, one can assume, if the condition were permanent previous to the accident, that became lighted up.

[fol. 49] Mr. Davis: We object to that. The evidence is it is not permanent.

Mr. Eagleton (continuing):

Q. One moment—if you will confine yourself to the hypothesis and the assumption therein contained and then give me your answer, what part, in your judgment, did the accident play, if any, in this new bone projection to cause pain or discomfort?

Mr. Davis: We object, for the same reason, to that additional question.

A. (By the witness): It is my opinion——

The Court: One moment. That new bone projection was not included in your former question.

Mr. Eagleton: Well, I will eliminate that.

The Court: Very well. Overruled.

The Court (addressing the witness): You are now asked what, after the accident, and assuming there was immediate discomfort and pain following the accident and there had been none before, what relation that accident would have to the change in the condition?

A. (By the witness): It is my opinion and I believe that the fall or the trauma——

Mr. Davis (interrupting): We object to his belief.

The Court:

Q. Well, you are giving this as your opinion, are you?

A. (By the witness): Yes, sir.

The Court: All right.

A. It is my opinion that this fall, or trauma to this point, lighted up the condition and caused this pain.

Mr. Eagleton (continuing):

Q. With reference to that opinion and the circumstances that I have mentioned, is that a common thing to have occur following an accident?

[fol. 50] Mr. Davis: We object to what is a "common thing".

Mr. Eagleton: All right. I will withdraw it.

Mr. Eagleton (continuing):

Q. Now, when a condition of that kind is lighted up, as you say you believed happened in this case, is there any

way of controlling the inflammation or infection that follows after the lighting-up takes place?

A. Only by the methods I used, the rays and application of heat in different forms, or it may only be offset by a rest to those members. Movement of the members would tend to aggravate the condition. Any movement of it, the spine, it tends to cause more pain.

Q. Is there, in your judgment, and has there been since the date of the accident, disability in the performance of manual work?

A. I think so.

Q. Will there be disability in the future?

A. There will be disability until this discontinues and after that he will have a disability because of the back being stiff.

Q. Is that condition, once it is lighted up, a painful condition—I mean painful is the sense that it is severe pain?

A. Yes, sir; very painful.

Mr. Eagleton: I believe that is all—what is the approximate amount of your bill to date?

A. To date my bill is $520.00.

Q. Is that a fair and reasonable charge, having in mind the length of time and services rendered?

A. I think so. I treated him over four and a half years.

The Court: Is he still under your care?

A. Yes, sir.

Mr. Eagleton: You may inquire.

[fol. 51] Cross-examination.

Questions by Mr. Davis:

Q. When was it you first saw him?

A. The early part of January, 1928.

Q. Do you remember the date?

A. I think it was the 10th.

Q. Did he come to your office?

A. Yes, sir.

Q. Who sent him to your office?

A. No one sent him—I don't know that anyone sent him.

Q. Did you know Mr. Eagleton before that time?

A. I know Mr. Eagleton for a long time.

Q. And did Mr. Eagleton send him to your office?

A. No, sir.

Q. Were you a schoolmate of Mr. Eagleton's?

A. We went to the St. Louis University; I went to the medical school, and I think Mr. Eagleton went to the law school.

Q. And you knew him at that time?

A. I knew him casually; yes, sir.

Q. Did you know Mr. Brady at that time?

A. No, sir.

Q. And you don't know how he came to see you?

A. I did not know at the time, but I know he was referred to me by a man named Green, whose family I had treated.

Q. Are you Mr. Eagleton's family doctor?

A. No, sir.

Q. Have you ever treated any member of his family?

A. No, sir.

Q. Now, you say, when he came to you, he weighed 145 or 150 pounds?

A. I think he weighed 160 pounds. Well, that was his story. I don't know anything about that; but when he came to be, though, he only weighed 145 or 150 pounds.

[fol. 52] Q. What does he weigh now?

A. At present he weighs 150 pounds.

Q. Now, you say after this condition becomes ankylosed, he will have disability?

A. That joint will become stiff.

Q. Well, he can work at that time, can't he?

A. Well, that depends on what kind of work.

Q. You say he could work after that, if it becomes ankylosed?

A. Well, I say there may be some types of work he should be able to do.

Q. Well, he could work inspecting cars, couldn't he?

A. I don't know much about the duties of an inspector; if he has to climb ladders, I don't think he would be so agile as he was previous.

Q. Well, it doesn't require an agile man to climb cars?

A. I don't know the duties of an inspector.

Q. Well, he would have to flash his light and inspect the cars.

A. If he were on the ground I suppose he could flash his light.

Q. Well, he could do that now, couldn't he?
A. Well, he is in pain.
Q. Well, a man could do things when he has pains?
A. I suppose he could.
Q. You have had pains and you did certain things?
A. To a certain extent; yes, sir.
Q. This man had no broken bones, had he?
A. Not that I could find.
Q. You X-rayed him, did you not?
A. Yes, sir.
Q. And you know how to X-ray a man, do you not?
A. Yes, sir.
Q. And what did the X-rays show—when did you take them, Doctor?
A. I took a picture about a week after he first came to my office, and then I took another one time six or seven [fol. 53] months later along, in the early fall of 1928, and then in the early part of 1929.
Q. Now, did it show any—you say about a week after he came to your office?
A. Yes, sir.
Q. That was about the 17th of January, 1928?
A. Yes, sir.
Q. And did it show any hypertrophic arthritis at that time?
A. The pictures that I took, as I recall, showed a condition of some bony growth in the lumbar region.
Q. And where is that?
A. That is just below the thoracic region of the spine.
Q. That would be the middle of the back?
A. Yes, sir.
Q. And where is this ankylosed condition you say has taken place, now?
A. No; the ankylosed condition now is between the tenth and leventh thoracic vertebrae. That is about two vertebrae above the part that I X-rayed.
Q. Now, when did you next take an X-ray?
A. I never, at any time, X-rayed the thoracic.
Q. What do you mean by the thoracic?
A. That is the chest and the ribs.
Q. And where is this ankylosed condition now?
A. That is the region consisting of chest and ribs.
Q. Well, this ankylosed condition isn't in the chest, is it?

A. It is the lower part of the back and the chest.

Q. But it is in the back, isn't it?

A. Oh, yes.

Q. Now, you say you never, at any time, took an X-ray of that?

A. Not of the bones of the thoracic; no, sir.

[fol. 54] Q. And you don't know whether there is any ankylosed condition there or not?

A. I have the films of Doctor Peden.

Q. I mean of your own?

A. Of my own knowledge; no, sir.

Q. And you don't know whether he had a hypertrophic condition or ankylosed condition that there is now, do you?

A. No, sir.

Q. What do you mean by "ankylosed"?

A. "Ankylosed" means stiff or grown together so they can't move.

Q. And that is all you mean?

A. You mean when you say "ankylosed" there is no longer any movement between them.

Q. Now, you say that spurs are thrown out in that condition?

A. In what condition?

Q. The condition that he had?

A. Do you mean previous to his accident?

Q. No, at the present time?

A. Yes; that may be a result of the condition existing.

Q. Well, does that mean that the two vertebrae are coming together?

A. Yes, sir; the top of one may grow up to the bottom of the other, or the bottom of one may grow to the top of the other.

Q. Well, is that the condition now?

A. I understand from Doctor Peden——

Q. No, Doctor, testify to what you saw.

A. I have not X-rayed him since that time, and I have never, at any time, X-rayed them parts.

Q. I believe you said you X-rayed him twice?

A. I X-rayed him three times.

Q. When was the first?

A. The first time he came which was the early fall of [fol. 55] 1928, and, I think, in January of 1929.

Q. And what did you X-ray?

A. The lower part of his back.

Q. When you found this arthritis there?

A. I found a solid, bony spur in the upper lumbar region.

Q. And you never X-rayed the place where this ankylosed condition took place?

A. No, sir.

Q. Do you happen to know that Doctor Peden X-rayed him?

A. Yes, sir.

Q. Do you know that he did?

A. Oh, I know that he X-rayed him at different times, because he would send me a copy of his report.

Q. And how long a time?

A. That I don't remember.

The Court:

Q. You said you saw Doctor Peden's——

A. Doctor Peden mailed me reports.

Q. Did you send him to Doctor Peden?

A. No, sir.

Q. (Mr. Davis continuing): Who sent him to Doctor Peden?

A. I don't know.

Q. Did Mr. Eagleton send him to Doctor Peden?

A. I don't know.

Q. Did you examine the X-rays of Doctor Peden?

A. I think I saw them in court at the previous trial.

Q. And Doctor Peden didn't send you the X-rays to examine?

A. Do you mean to my office?

Q. Yes.

A. No, sir.

Q. The original arthritis that you found in his back was a diseased condition, was it not?

A. Might have been, yes, sir.

Q. Due to disease?

A. Yes, sir.

Q. So that has nothing to do with the condition which he [fol. 56] now complains of?

A. Some arthritis must have existed before injury.

Q. You say you never saw Doctor Peden's X-rays, except here in court?

A. That is the only time I have any recollection of seeing the pictures.

Q. That is, in 1929?

A. I think so.

Q. And you can read X-rays, can you not?

A. Yes, sir.

Q. And you didn't call for those X-rays for the purpose of treating him?

A. Doctor Peden mailed me copies of his reports.

Q. I know, but he didn't send you the X-rays?

A. No, sir.

Q. And the X-ray is really a photograph, isn't it?

A. Yes, sir.

Q. And he didn't send you those X-rays?

A. He sent me a report of his findings.

Q. And you were treating him at the time?

A. Yes, sir.

Q. Don't you consider an X-ray necessary in order to do a treatment?

A. Yes, sir.

Q. Then why didn't you send for Doctor Peden's X-rays?

A. Doctor Peden had X-rayed him.

Q. Didn't you consider the X-rays necessary in order to treat him?

A. Do you mean that I ought to read them?

Q. Yes, sir.

A. I think Doctor Peden is more skillful in X-rays than I. I took his word for it.

Q. You took his word for it?

A. Yes, sir; coupled with the physical findings, I accepted the X-ray findings of Doctor Peden.

Q. You consider yourself a capable X-ray man, don't you, Doctor?

A. Yes, sir.

[fol. 57] Q. And you can take X-rays and read them?

A. Yes, sir.

Q. How many X-rays did you take before that time? Do you know?

A. Of this patient?

Q. No, of all other patients?

A. I personally have taken about six or seven hundred.

Q. And after taking those six or seven hundred X-rays, you could read them?

A. Yes, sir.

Q. And you found out what was the condition of the people that you took the X-rays of, did you?

A. Yes, sir.

Q. And you had no trouble in that respect?

A. None.

Q. Now, you say you don't know when this man was sent to Doctor Peden, first?

A. No, sir; I do not.

Q. About how long, do you know?

A. I have no idea.

Q. Where is Doctor Peden's office?

A. In the Missouri Theater Building, I think.

Q. In the City of St. Louis?

A. Yes, sir.

Q. Do you know Doctor L. A. Will?

A. Yes, sir.

Q. Where is he a graduate of, do you know?

A. I don't know.

Q. What building are you in?

A. I am at Grand and Hebert; no particular building.

Q. And that is in North St. Louis?

A. Yes, sir.

Q. And if Doctor Will is in the Missouri Theater Building, it is some distance from you?

A. Well, my number is 3100.

Q. And had Doctor Will a good reputation as a doctor in this town?

Mr. Eagleton: I object to that as immaterial.

The Court; So far it is.

[fol. 58] Mr. Davis (continuing):

Q. Do you know whether Doctor Will belongs to the same medical society——

Mr. Eagleton: I object to that as immaterial.

The Court: Sustained for the same reason.

Mr. Davis (continuing):

Q. I don't know whether you said, Doctor, this man has no broken bones?

A. No, sir; not that I know of.

Q. The X-ray didn't show any broken bones?

A. No, sir.

Q. That is, the X-ray that you took?

A. Yes, sir.

Q. Now, this man can do work at the present time, can't he, Doctor?

A. Well, I think he could do some light work, that is, he could work a few hours, I believe, and if he would move around for a few hours his pain would become worse and then he would have to quit. My experience has been that those members on irritation and aggravation, the pain gets worse and then the patient has to rest.

Q. How long was it before you knew of this ankylosed condition?

A. Well, that I don't know exactly. Doctor Peden mailed me copies of his X-ray reports from time to time.

Q. And haven't you a record of that, Doctor?

A. I have them at the office.

Q. And didn't you bring your records with you?

A. No, sir; I read them over before I came down. I have been reading the man's record for six years.

Q. What is the matter? Don't you want us to look at them? You didn't bring them?

A. I think Doctor Peden will show you his records.

Q. Well, I ask you why you left them at the office? You knew you were going to testify this morning?

A. Yes, sir.

[fol. 59] Q. You say that he has three braces?

A. Yes, sir; that I know of, two or three braces.

Q. And is it necessary for him to wear those braces?

A. At this time, I think it is.

Q. Was it necessary for him to wear it in the beginning?

A. I prescribed for them shortly after I had seen him. I should say about three months after I first started to see him.

Q. You treated him then?

A. Yes, sir.

Q. You treated him in the first instance when you X-rayed him, didn't you?

Q. I know, but you prescribed them for the condition you first saw his back in?

A. I prescribed them for this injury.

Q. Well, you prescribed this brace for his back, because

of the arthritis that you found upon your X-rays, did you not?

A. Yes, sir. I would have to add, though, to that that the condition that I found was due, that is, the condition of the patients complaining of the pain, with the history of falling on his back, the evidence there was such that I thought he had lighted up the condition, and it was necessary there to prescribe a belt to hold those parts rigid, to allow it to subside.

Q. Yes; but you testified that the condition you found was not due to the injury?

A. When you say "condition," to what do you refer?

Q. The arthritis that you find?

A. The arthritis I know nothing about that. The arthritis I found was due to the accident and the injury.

Questions by the Court:

Q. Doctor, what was the condition of arthritis you found, [fol. 60] leaving out the pain, the suffering, what was the condition of the arthritis you found on the 10th of January, 1928?

A. The evidence in the spine at that time was a slight bony growth in the upper lumbar region, which is the loin, vertebra, below the thoracic region, and I know the evidence, know that a condition of that kind couldn't occur in a week or two.

Q. In other words, that must have been there previous to January 10th?

A. Yes, sir; but the physical findings and the complaints of the patient, and the history of the case, led me to believe that the injury was the lighting up of the condition.

Q. What do you mean by "lighting up"?

A. Well, if somebody steps on your toe and you have an ingrown toe nail, that hurts you, and it probably don't hurt if you haven't that bruise on it.

The Court: All right.

Mr. Davis (continuing):

Q. You didn't know anything about this condition that you said was ankylosed then, did you?

A. I didn't say that his back was ankylosed at that time, no; but I say the condition, it is ankylosed now.

Q. You didn't know anything about that at that time?

A. No, sir.

Q. And that didn't appear at that time?

A. No, sir. The part of the back that I X-rayed was a solid, bony projection, and that was due to hypertrophic arthritis.

Q. And that had nothing to do with this accident of November 20, 1927?

A. No, sir.

Q. Now, this condition which you find at present, or of which you say he is now complaining, you didn't know any-
[fol. 61] thing about that when you first examined him?

A. No, sir.

Q. And it didn't appear, according to your X-ray?

A. No, sir.

Mr. Eagleton: He didn't X-ray that portion.

Mr. Davis: I know he didn't.

Mr. Davis (continuing):

Q. But you don't know how long that had been there, do you?

A. No, sir.

Q. It may have been there a long time before?

A. I don't know when it was started.

Q. Well, I say, it may have been there a long time before, could it not?

A. Yes, sir.

Questions by the Court:

Q. Did or did not your X-rays—did you take more than one X-ray on January 10, 1928?

A. Just one.

Q. Well, did, or did not, that X-ray cover the part that you now find ankylosed?

A. No, sir, it did not extend up to that region.

The Court: Go on.

Mr. Davis (continuing):

Q. Now, when did you discover that there was a hypertrophic arthritis at the place where this ankylosis took place—when was it?

A. I don't know when.

Q. Did he complain of that place before?

A. Yes, sir; he complained of his injured back from the shoulders to the hips.

Q. All of his back?

A. From below the shoulders, scapulars, to the hips.

Q. Now, do you know where he was before he went to see you?

A. Except that he told me he had been treated in Granite City.

Q. Treated where?

A. I don't know.

[fol. 62] Q. At Saint Elizabeth's Hospital?

A. I couldn't say.

Q. Did he tell you how long he had been there.

A. I don't remember.

Q. Did he tell you he had been there a week and discharged?

A. I don't remember.

Q. You don't remember whether he told you that, or not?

A. I don't remember that he did.

Q. Did he tell you he had gone to work afterwards?

A. He said he had gone to the office and that he had sat around, and his back still hurt him, and he came to me, and I gave him his examination.

Q. What are the spinous processes, Doctor?

A. The spinous processes are bones that protrude backward from the vertebra. They are portions of the vertebra which we can feel as one runs the finger down the back bone.

Q. Very natural, are they not?

A. Yes, sir.

Q. Now, on which side did you find this ankylosed condition?

A. I think it is on both sides of the vertebra, that is, on the right and the left.

Q. He had nothing the matter with his abdomen, had he?

A. Nothing that I recall.

Q. And he had no paralysis?

A. No, sir.

Q. Could pain have come from—could abdominal pain have come from this fall?

A. Well, he could and he could not.

Q. But he didn't complain of any when you saw him?

A. No, sir.

Q. The only condition he complained of was his back?

A. His back and his hips, and headaches.
Q. He didn't complain of falling on his head, did he?
A. No, sir.
[fol. 63] Q. He didn't complain to you of falling on his head, did he?
A. No, sir.
Q. He didn't tell you that he hit his head?
A. No, sir.

Mr. Davis: I think that is all.
Mr. Eagleton: That is all.

Witness excused.

Thereupon, the Court duly and properly admonished the jury as to the proper conduct of its members while court should not be in session, and the court then took a recess to the hour of two o'clock P. M. of that day.

At which day and hour, court was duly reconvened and, the jury being present as before, the following proceedings were had, to-wit:

THOMAS J. BRADY, the plaintiff, being recalled to the witness stand, further testified as follows:

Cross-examination.

Questions by Mr. Davis:

Q. Mr. Brady, you said you were in the hospital about two weeks. What hospital was that?
A. Saint Elizabeths Hospital.
Q. At Granite City, Illinois?
A. Yes, sir.
Q. And if the records show that you were discharged on the 26th of November, 1927, then you would be mistaken about being there two weeks, would you?
A. If the records say that, it must be correct. I could be mistaken about that, but it seems to me like it was longer.
Q. Well, do you remember Doctor Moreland?
A. No, I don't recall the name there.
[fol. 64] Q. This is a copy of the record, and if that would show that on November 26, 1927, "patient was discharged"——

A. (Interrupting.) They could be right about the date of discharge, but I don't remember Doctor Moreland.

Q. They could be right about the date you were discharged?

A. Yes, they could be.

Q. Now, you were up and walking about that date, weren't you?

A. Walking around in the hospital.

Q. You were up and walking about?

A. No, sir; I wasn't up and walking about?

Q. So, if the records say that you were up and walking about, then the records would not be correct?

A. They surely would not.

Q. You weren't up and walking about?

A. No, sir.

Q. But you could be mistaken about being there two weeks?

A. I could be; yes, sir; the records may be right on that.

Q. You went home?

A. I was taken home in an automobile; yes, sir.

Q. Then when did you go down to the place where you worked?

A. It was three or four days after I went home.

Q. And what did you do down there?

A. They came after me every morning in an automobile and took me down to the office.

Q. Who did that?

A. The car foreman for the Wabash.

Q. Sent you an automobile and you went down there every day?

A. Yes, sir.

Q. For how long did you go down there?

A. It must have been over a month.

Q. And did you do any work down there?

[fol. 65] A. I didn't have any duties at all. All they asked me to do was to come to the office.

Q. And did they pay you for that time you were there?

A. They paid me with checks from that time; some days I didn't get paid for.

Q. And that was over a month?

A. Yes, sir; if I am not mistaken.

Q. So that ran you up into January, did it?

A. I believe it did, some time in January.

Q. That is, you went down there every day up until January?

A. No; there were several days that I missed going down.

Q. Well, several days, but with the exception of those several days——

A. (Interrupting.) Yes, until January I went down there.

Q. Then, in January, you employed Mr. Eagleton, did you?

A. I didn't employ Mr. Eagleton in January, I don't believe.

Q. When did you say that you went to see Mr. Eagleton?

A. I don't remember the date of that first, what time it was; it has been six years ago.

Q. Did you go to see him in January, 1928?

A. I didn't see Mr. Eagleton until after the officials of the Wabash told me they couldn't do anything for me, that they couldn't pay me.

Q. When did they tell you that?

A. I don't remember the date of that; it must have been some day in January or February.

Q. Well, did you see any other attorney besides Mr. Eagleton?

A. No, I never.

Q. So he filed suit for you against the Wabash, did he?

A. Yes, he filed suit for me against the Wabash.

Q. And if the record shows that he filed suit on January [fol. 66] 18, 1928, then you had seen him before that time?

A. I suppose so. The record must be correct. On January 18th, it shows the date of filing the suit in the case of Brady vs. Wabash was January 19, 1928.

The Court: All right.

Mr. Davis (continuing):

Q. So you must have seen Mr. Eagleton before that time?

A. It must have been.

Q. And you say you thought the Wabash Railroad couldn't do anything for you?

A. Yes, sir; they told me they couldn't continue paying me my time, for going there and sitting around.

Q. Then you went to see Mr. Eagleton?

A. Yes, sir.

Q. You filed suit against the Wabash then, did you?

A. It must have ben about that time.

Q. And do you know when you filed this suit against the Terminal Railroad Association?

A. No, sir; I don't remember that date, either.

Q. That must have been two years later?

The Court: This is marked "August 17, 1929."

Mr. Davis (continuing):

Q. Well, you didn't file suit, then, until August 17, 1929, did you, against the Terminal Railroad Association, if that is what the record says?

A. If that is what the record says, it must be right.

Q. Now, when you went up on this ladder, on the side of this box car No. 76085, you climbed up this ladder, did you?

A. Yes, sir.

Q. And when you got to the top, you reached over on top of the car?

A. Yes, sir; when I got to where I could reach the top grab iron.

Q. Did you put your light on it, see it?

[fol. 67] A. I had my light in my left hand, and I reached over to pull the grab iron——

Q. (Interrupting.) Were you shining your light on the grab irons?

A. I was shining my light on them; yes, sir.

Q. And you didn't see anything wrong with them?

A. I didn't find anything wrong with them until after I took hold of the top one and after I put my weight on it——

Q. (Interrupting.) When you pulled the grab iron, it felt firm?

A. Yes, sir.

Q. And previous to that you had shined your light on it?

A. When I shined my light it was over the side grab irons——

Q. (Interrupting.) I am speaking about this grab iron on the longitudinal running board; you didn't see anything the matter with that, did you?

A. I didn't get to that part of it yet, because, in going to the top, I had my lantern in my left hand and, before you get to the top of the car, the top grab iron that is on

the side of the car is 20 inches from the top of the car; you have to hold on that one and then you have to transfer yourself to the top grab iron on top of the car, in order to get yourself up; but you couldn't see that from the side of the car.

Q. I know, but this grab iron on this top iron, you couldn't feel any give to it?

A. It felt firm enough at that time.

Q. And you shined your light on it and you couldn't see anything wrong with it?

A. I hadn't shined my light on the top grab iron, because you have to get on top to do that.

Q. Well didn't you look over and see?

[fol. 68] A. No. From the side of the car, you couldn't shine your light on the top grab iron.

Q. And you didn't know its condition then?

A. All the condition I know is that the latitudinal running board fell with me to the ground.

Q. And when you felt that at first it felt firm?

A. Yes, sir; I gave it the only test I could.

Q. Describe what test you gave it?

A. Going over the top of the car, I reached up to give this grab iron the test, as I do all the grab irons, and it felt firm and it seemed like it was solid enough to pull yourself up on, and when I started to pull over the top of the car the whole latitudinal running board fell down to the ground.

Q. Now, when an inspector gets up on top there, ordinarily, he investigates, don't he?

A. Yes, after you got on top of the car then you can investigate the car on top, first the brake staff and brake wheel and running board, the holes in the roof; you can make a full inspection of the top, after you are on the top.

Q. And you can inspect those by shining your light?

A. Yes, sir, after you get on top.

Q. And that is what you intended to do in this instance, is shine your light on it?

A. That was my intention; yes, sir.

Q. And then, before you got to the top this board, the whole thing pulled down?

A. The whole latitude and the ladder pulled loose.

Q. And, when you fell to the ground, you must have fallen backwards?

A. I fell backwards; yes, sir.

Q. Were you unconscious?

A. Just for a minute or two.

Q. What do you mean, "a minute or two?"

[fol. 69] A. Just a short time, because Mr. Rhine was over on the other side, because he said when he got over to where I was he commenced to talk to me and he said I couldn't talk. I was out for a minute.

Q. And then, after you became conscious, you got up; and did you have anything in your hand then?

A. After I was on the ground, after I, you know, came to myself, I had a part of the grab iron, or one end of the grab iron that came down was in my hand.

Q. And the other part of the grab iron had pulled out, or was the latitudinal running board on it?

A. The back end of the latitudinal running board, with straps and half-inch bolts, had pulled through the wood.

Q. Did you examine it then?

A. No, I didn't examine it then, but my attention was called to it by somebody who came to pull me up to the other end of the yard.

Q. Did you look at it?

A. One of the men that came down said, "Look here. No wonder you fell off. This whole running board is rotted off."

Q. Now, how long had you been inspecting for the Wabash?

A. I had been inspecting for the Wabash, I think, about three and a half years.

Q. And had you been inspecting at this same place for three and a half years?

A. I had.

Q. And what cars would you inspect?

A. All cars that were delivered to the Wabash yards there from all over.

Q. You would inspect all cars?

A. All cars; yes, sir.

Q. Whether they were by the Pennsylvania Railroad or the Terminal Railroad, or whatever road may have deliv-

[fol. 70] ered them to you, then you inspected them?

A. Yes, sir; whatever road delivered them, it was my duty to inspect them.

Q. Now, when you inspected them, those roads knew that the Wabash had inspected the cars, did they not?

A. I presume they did.

Q. And you were in the habit of doing that with all cars that were presented to you for inspection?

A. Yes, sir; as Wabash inspector it was my duty to inspect all cars delivered there.

Q. And you were employed by the Wabash Railroad?

A. Yes, sir.

Q. And it was your duty to find out anything that was wrong with those cars, was it not?

A. It was my duty to inspect the cars to see if they were in a safe and serviceable condition to continue on.

Q. And that is what you hunted for, was defects in cars?

A. I was looking for defects, yes; that is, defects in running gears and everything, but I was not expecting to find anything of that nature.

Q. I know, but you were looking for it, were you not?

A. I was looking for defects on all the running gears and safety appliances and everything. It was my duty, but I wasn't looking for anything so out of order.

Q. I know, but you were looking for defects?

A. I was looking for defects; yes, sir.

Q. And this grab-iron was what was called a safety appliance, if you know?

A. Yes, sir.

Q. And you knew that this was what was called a safety appliance——

A. Yes, sir.

Q. That you caught hold of and pulled out?

A. Yes, sir.

[fol. 71] Q. And you intended to inspect that, did you not?

A. Yes, it was my intention, after I had gotten on top of the car, to inspect that and see if it was in a safe and serviceable condition.

Q. You say that when you got on top of the car, you intended to inspect this grab iron on the latitudinal running board that pulled out?

A. Yes, sir; it was my intention, after I got on top of the car.

Q. Now, the Terminal Railroad Association knew that you would make that kind of an inspection, did they not?

A. Yes, sir; they did.

Q. Yes, they knew that the Wabash inspected all cars that were delivered to them, did they not?

A. Yes, sir.

Q. Now, as you went up there you couldn't see the defective condition of this running board and the grab iron, that is, you couldn't see this rotten condition?

A. You couldn't see this rotten condition unless you were on top.

Q. Well, could you see it when you got on top?

A. You could have seen it when you got on top, because it would have been in plain view.

Q. Didn't it pull out from underneath?

A. In pulling away from the running board, it would have to pull away from both sides, top and bottom.

Q. The whole thing pulled out, didn't it?

A. The whole thing fell down and the rotten wood came down with it.

Q. And you tried it before you got up on top?

A. I tested the hand iron.

Q. And you pulled on it to see whether or not it was safe?

A. I tested it to see whether or not it was safe.

[fol. 72] Q. And you didn't see the condition of that at all until after it pulled out and was on the ground, did you?

A. No, you couldn't see its condition until after it was down on the ground.

Questions by the Court:

Q. If I understand you, Mr. Brady, the condition of that board as to being rotten, could not have been seen until it was on the ground and exposed; is that right?

A. I didn't see it.

Q. Well, I asked you what you saw. You have stated that you could not see the condition of the board, that is, its rotten condition, until it got on the ground?

A. No, sir; that is true.

Q. It wasn't visible even after you were on top of the car?

A. It would be visible, if you were on top of the car.

Mr. Davis: I object to that, and ask it be stricken out. He didn't see that.

The Court: Well, I am confused on his testimony. His testimony may be clear enough to everybody else, but it is not quite clear to me about the point I was inquiring. I think, Mr. Brady—come up here a moment, you gentlemen —I don't want to make those comments before the jury.

(The following colloquy occurred out of hearing of the jury and in the presence of the Court and counsel.)

The Court: He has made contradictory statements, or my hearing is defective or the notes are wrong in the last few minutes. He said, "Could have seen the condition if I had [fol. 73] got on the roof—on the top," rather. Then he said the whole thing pulled out and the rotten board came out, "Not visible to see if safe; couldn't see the condition until had the board on the ground." In other words, he left the distinct impression in my mind that this rotten condition could have been observed, it was in such a condition to have seen it if anybody was on the roof. Then he again says that all he knew of its condition was what he saw when it lay on the ground.

Mr. Eagleton: I think both of those statements are true. He says that all he knows as to its condition was after it got on the ground, and when the defendant asked the question: could he have seen its condition had he gotten up on top, and he answered, "Yes."

The Court: Well, go on, gentlemen. I just wanted to let you know the state of my mind.

Mr. Davis (continuing):

Q. Now, you say that the purpose of the inspection was to determine whether the cars were to be received or rejected by the Wabash?

A. Yes, sir.

Q. And you said you were inspecting and examining everything to see whether there was anything defective about it?

A. To see whether there was any reason why the car was to be rejected or whether it was O. K.

Q. And you were inspecting this car?

A. I was in the act of inspecting this car when I fell.

Q. Now, when you got up on the car, you took your light and examined things, did you?

A. As I was going up the side of the car, I was examining the handholds with my lantern.

Q. And you would go up one car and Mr. Rhine would go up the other?

A. Yes, sir.

[fol. 74] Q. And what would you do, go up one ladder and then go back that same ladder?

A. When I would go up the car, I would go up my side of the car, the side I was working on, and go up there and make an inspection of the entire roof of the car, and go back down on my end of the car, and Mr. Rhine would inspect the side grab irons and the end grab irons from his side.

Q. And did they also have end ladders on, too?

A. Yes, sir.

Q. Did you go up the end ladders?

A. Yes, sir; we inspected the end ladders by turning the light on them.

Q. You merely turned the light on them?

A. Yes, sir.

Q. That is, all you did was turn the light on the end ladders?

A. Yes, sir.

Q. You didn't inspect them by anything else except turn the light on them?

A. Yes, sir; you turn the light on them so you can see the bolts and the nuts that hold the grab iron on the front end of the car. That is the reason we turn the light on there; they are all in view.

Q. Now, you worked on a vegetable truck, you say, for about two weeks?

A. Yes, sir; I worked about two or three weeks.

Q. What did you do?

A. I was packing the vegetables, putting them in baskets, I and a man that was working with me.

The Court: Don't drop your voice. I don't hear you.

The Witness: It was my duty to place the vegetables in [fol. 75] baskets and keep track of the amount that was sold, and the man that was working with me would deliver them.

Mr. Davis (continuing):

Q. And what did you deliver them by, automobile?

A. Yes, sir; they were delivered by truck.

Q. And you rode on the truck, did you?

A. Yes, sir.

Q. And when was that you worked on the truck?

A. That has been about a year ago.

Q. And how long did you work?

A. About two or three weeks.

Q. And you merely kept track of the vegetables?

A. Yes, sir; I had a book; I was the bookkeeper. I would put the amount down in the book, and the rest of the fellows would sell.

Q. Did you sit on the seat all the time?

A. Yes, sir.

Q. Didn't get up off the seat?

A. Oh, I had to get up out of the car or stay down on the running board of the car, outside of the car. It was my duty to put the vegetables in baskets, but you have to pack baskets, and they were delivered in that way, apples and vegetables.

Mr. Davis: I think that is all.

Redirect examination.

Questions by Mr. Eagleton:

Q. During the time that you worked there, do you know whether or not the railroad that you worked for, the Wabash Railroad Company, was a subscriber to the A. R. A. Rules?

A. Yes, sir.

Q. And do you know whether or not the Terminal Railroad Association was?

A. Yes, sir; the Terminal subscribed to it; yes, sir.

Mr. Eagleton: I have the Rule Book here, which I would like to have marked Plaintiff's Exhibit No. 1.

[fol. 76] (The reporter marked the Rule Book referred to as Plaintiff's Exhibit No. 1.)

Mr. Eagleton: Judge Davis suggests that I just read the rule. I now offer in evidence, if the Court please, this Rule Book for the purpose of showing the list of subscribers, which includes the two companies named, and paragraph A of Rule 2, with reference to interchanging cars.

Mr. Davis: We object to that, Your Honor, because the petition is grounded on the Common Law Negligence and also on Safety Appliances, which intermingle those two in the petition, and we think that it is objectionable for that reason. It is not grounded on the Federal Liability Act or the Safety Appliance; it is grounded on Common Law Negligence. He has grounded his petition on the Safety Appliance Act, but not on the Federal Employer's Liability, and it is as to it, that Common Law Negligence, so to speak,

and, under these circumstances, we do not think it is admissible.

The Court: Well, why not on that scale, Mr. Davis?

Mr. Davis: Because, if it is common law negligence, then it is a State action and not a United States action, if you understand what I mean. If it is a State action, then, possibly, the Illinois Compensation Commission would take charge of it, but it is a State action not under the Federal Employers' Liability at all. Of course, the Safety Appliance, that is a very different thing from the Federal Employers' Act, but this thing itself is grounded on the Common Law Negligence.

The Court: And the Safety Appliance Act, that is what you said?

[fol. 77] Mr. Davis: That he has alleged two things in his petition, which he cannot do.

The Court: Well, that has been thrashed over hasn't it?

Mr. Davis: Yes, sir.

The Court: Overruled.

To which action of the Court the defendant, by its counsel, then and there at the time, duly objected and excepted, and still continues to object and except.

Mr. Eagleton: This rule is as follows:

EXHIBIT No. 1

"Rule 2. Yard Interchanging Cars. Paragraph 3. 'Cars (whether loaded or empty) having defects in violation of the Safety Appliance Act should not be offered in interchange'."

The Court: Let me see that.

(Mr. Eagleton hands the exhibit to the Court.)

The Court: Very well. You may proceed.

Mr. Eagleton (continuing):

Q. Was that one of the rules effective in November, 1927, and at the time you were hurt?

A. Yes, sir.

Q. And before that time?

A. And before that time; yes, sir.

Mr. Eagleton: If the Court please, I also want the record to show the movement of car No. 76085, Wabash car, which has been referred to here in evidence as given me by Judge Davis in answer to a notice to produce that information, which car in question, No. 76085 Wabash car, was received by the Terminal Railroad Association of St. Louis, the defendant in this case, at its Grand Avenue yards November 16, 1928, and on that same date was transferred by the de-
[fol. 78] fendant to the Bremen Avenue yards, that is, its Bremen Avenue yards, and later on that same date was transferred by the defendant to its Tenth Street warehouse, where it apparently remained until the 17th.

Mr. Davis: I guess it may be agreed that this Wabash car No. 76085 was delivered to the Terminal by the Wabash Railway Company at Grand Avenue on November 16, 1927, moved to the Bremen Avenue on the same date, and also to the Tenth Street yard on the same day.

Mr. Eagleton: By the Terminal?

Mr. Davis: By the Terminal, and by the Terminal was placed in the Tenth Street warehouse on November 17, 1927.

Mr. Eagleton: All right. The next movement of the car after being placed in their warehouse on that date, was on November 20, 1927, the date in question, when it was pulled by the Terminal from the warehouse site mentioned in the City of St. Louis and placed upon the inbound track we have been speaking about as track No. 11, arriving there at or about 6 P. M., November 20, 1927?

Mr. Davis: Yes.

Mr. Eagleton: I believe that is all.

Recross-examination.

Questions by Mr. Davis:

Q. The Terminal Railroad Association, do you know where it runs?

A. Yes, sir.

Q. Where?

A. It includes all the districts of St. Louis and surrounding territory that is over in Illinois.

Q. It is a switching railroad, isn't it?

A. Yes, sir; they switch cars for all the railroads coming into St. Louis, I think.

[fol. 79] Q. That is, there are about how many—fifteen, sixteen, eighteen railroads coming into St. Louis?

A. Somewhere in that neighborhood.

Q. And they switch all the cars of those railroads coming into St. Louis?

A. Yes, sir.

Q. And they received that car from the Wabash Railroad and switched it to some industry and then switched it back and tendered it to the Wabash, is that what they did?

A. Yes, sir. They have their own yards and switching crews and their own report sheets and inspectors also.

Q. Does the Terminal Railroad have its own switching yards and switching crews and so forth?

A. Yes, sir.

Q. And they switch the trains from the industries of St. Louis to the other railroad yards, do they?

A. Yes, sir.

Q. And the other railroads go and get them in their yards, do they?

A. No. The Terminal delivers the cars from their own yards to the other railroad yards.

Q. Just as they did in this instance, they took the car from the Wabash and gave it to an industry, and then gave it back to the Wabash?

A. They took the car from the Wabash?

Q. Yes.

A. I don't know where they took it from.

Q. Well, this was a Wabash car you were inspecting?

A. Yes, sir.

Q. And that belonged to the railroad you were employed by, did it not?

A. It did; yes, sir.

Mr. Eagleton: It may be admitted, I assume, that both the Wabash Railroad Company, which is his employer, and [fol. 80] the Terminal were both railroads engaged in handling interstate commerce at and since that time—that is true, isn't it?

Mr. Davis: Yes, sir.

Mr. Eagleton: That is, both common carriers; that is right?

Mr. Davis: They were both engaged in interstate commerce generally.

Mr. Eagleton: That is all.

Mr. Davis: That is all.

Witness Excused.

Doctor Joseph C. Peden, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified, on behalf of the plaintiff, as follows:

Direct examination.

Questions by Mr. Eagleton:

Q. State your name, please.
A. Joseph C. Peden.
Q. What is your business or occupation?
A. Physician.
Q. Of what medical school are you a graduate?
A. St. Louis University.
Q. What year?
A. 1915.
Q. Since graduating there have you specialized in any particular branch of medicine or surgery?
A. Yes, sir.
Q. What branch?
A. X-ray.
Q. Are you in charge or not of the X-ray department of the City of St. Louis or hospitals?
A. Yes, sir.
Q. Which ones?
A. St. John's and Deaconess Hospitals.
[fol. 81] Q. Doctor, roughly speaking or estimating, how many X-ray pictures have you had occasion to examine, interpret and develop.
A. I estimate it around about one hundred thousand.
Q. Did you make some X-ray pictures of this plaintiff's back and spine in the year 1929?
A. Yes, sir.
Q. Will you get those films for me, please?

(The witness hands the films to Mr. Eagleton.)

Q. Are there two or three?
A. There are four. This one (indicating) isn't particularly important.

Mr. Eagleton (addressing the reporter): Will you mark these some place as Plaintiff's Exhibits Nos. 2, 3, and 4?

(The reporter marked the X-ray films referred to as Plaintiff's Exhibits Nos. 2, 3 and 4.)

Mr. Eagleton (continuing):

Q. Doctor, here is Plaintiff's Exhibit No. 2, and I ask you if this is one of the pictures you took of the plaintiff's back and spine on February 19, 1929 (handing picture to witness)?

A. Yes, sir.

Q. What part of the back or spine is shown in that X-ray?

A. It is that part of the back or spine which corresponds to the chest.

Q. What vertebra does it include?

A. It includes on that the thoracic and the chest and second lumbar.

Q. I will ask you what it shows, if anything, by way of deformity in any of those vetebrae?

A. It shows a slight amount of hypertrophic changes with a slight new bone projection on the eleventh thoracic vertebra.

Q. Examining those other two exhibits, which are numbered 3 and 4, I wish you would examine those, the view I [fol. 82] mean, which one of the exhibits, 2, 3 or 4, shows the most clearly; and when you tell me that I will have this shadow box arranged so you can indicate it to the jury.

A. This one here of the lumbar spine, it really doesn't show anything—this one, I think, is No. 4.

Q. Now, Doctor, with the aid of this shadow box, take this exhibit, which is Plaintiff's Exhibit No. 2, and put that in the shadow box and point out to the jury where you see any evidence of bone changes?

A. This bone right here (indicating) is the eleventh thoracic vertebra, and on the lower edges there are little points as shown, one right there on the side (indicating), and a smaller one on the left side; instead of the bone being rounded as it normally should be, it comes out to a point.

Q. Will you indicate that again?

A. Right on the right side (indicating).

Q. Is that the eleventh thoracic vertebra on the right side at the lower margin?

A. That is right, with a similar one on the left side of the eleventh.

Q. Now, that is a picture taken from front to back?

A. Yes, sir.

Q. That is what you call anteroposterior?

A. Yes, sir.

Mr. Davis: When was that taken?

Mr. Eagleton: That was taken February 19, 1929.

Mr. Eagleton (continuing):

Q. Now, the next was taken—is that a lateral view?

A. Yes, sir.

Q. This is No. 4 that I have in the shadow box now, which is the lateral view, taken from side to side, showing the same vertebrae?

A. Yes, sir.

[fol. 83] Q. Will you indicate to the jury there where that is shown in that picture?

A. It is shown slightly at this point right here (indicating). It is on the front surface of the body of the eleventh thoracic vertebra.

Q. Is it this part I am circumscribing now that shows the outgrowth of bone (indicating)?

A. Yes, sir.

Q. And that is on the eleventh thoracic vertebra?

A. Yes, sir.

Q. Now, take your pictures taken in 1932. I will have to mark those again, Mr. Manton, Plaintiff's Exhibits Nos. 5 and 6.

(The reporter marked the pictures referred to as Plaintiff's Exhibits Nos. 5 and 6.)

Q. Now, put it in the shadow box. I will hand you No. 5, and ask you to put that in the shadow box. Now, that pictu-e, I believe, was taken by you under date of October 3rd, 1932; is that correct?

A. Yes, sir.

Q. Show the jury what, if anything, abnormal appears in that picture with reference to this vertebra. That is a lateral view from side to side, is it?

A. Yes, sir. This is the twelfth thoracic vertebra (indicating). This is the eleventh, and this is the tenth (indicating), and on the twelfth there is a definite projection or increase in this bony projection as was shown two or three years previously, and, in addition to that, between the tenth and eleventh there is almost a complete fusion between the vertebra. In other words, those two points that come out have practically grown together and attempting to form a union between the bones.

[fol. 84] Q. Now, the attempted union is where there is a break appearing there in your picture?

A. Yes, sir.

Q. And that is between the bottom of the tenth and the upper part of the eleventh, is it?

A. Yes, sir.

Q. In addition to that you find an outgrowth of bone on the twelfth?

A. Yes, sir.

Q. Is that something we can plainly see in either of those conditions here with the naked eye?

A. Yes, sir.

Q. I mean the layman, when it is pointed out to him, he can see it?

A. I think so; yes, sir.

Q. This Plaintiff's No. 6, that is a front-back view, taken at the same time, October 3, 1932. Where do you find the evidence of that increased condition in that, Doctor, if at all?

A. In this view, this is the eleventh (indicating) and this point that I described as being on the lower margin of the eleventh thoracic on the right side, is right here (indicating) and, to my notion, it is definitely greater and longer; and then, in addition to that, there is a little projection beginning on the upper part of the tenth on the right side, which I was unable to see in the 1929 pictures.

Q. So, comparing the two sets, the 1932 picture shows something additional on the upper margin of the eleventh, something additional on the lower margin of the twelfth, and the coming together of the eleventh and twelfth?

A. Yes, sir.

Q. Are those pictures clear pictures?

A. I think so; yes, sir.

Q. Let me have those other pictures you have there. (Addressing the reporter). Mark these Plaintiff's Exhibits Nos. 7 and 8.

(The reporter marked the pictures referred to as Plaintiff's Exhibits Nos. 7 and 8.)

[fol. 85] Q. Now, I hand you Plaintiff's Exhibit No. 7, which is a picture taken this year, October 2, 1933, and wish you would put that in the shadow box and tell us what it shows by way of abnormality, if anything?

A. It shows the same process of the tenth, eleventh and twelfth as is shown in October, 1932. That is a side to side view.

Q. That is a lateral view?

A. That is a lateral view; yes, sir.

Q. And Plaintiff's Exhibit No. 8, which is a front and back, taken at the same time, October 2, 1933.

A. In Plaintiff's Exhibit No. 8, this process as shown on the lower right side of the eleventh thoracic vertebra (indicating), I think is very definitely increased in the last year.

Q. All right, Doctor. Now aside from the taking of those X-ray pictures, at the three different times that you took them, in 1929, 1932, and 1933, you had nothing else to do with the treatment of the case otherwise?

A. No, sir.

Q. I believe you have testified in the other cases when they were tried?

A. Yes, sir.

Mr. Eagleton: All right. That is all.

Cross-examination.

Questions by Mr. Davis:

Q. Doctor, you first took those X-rays on February 19, 1929?

A. Yes, sir.

Q. And that was a year and about three months after the accident occurred, was it? It occurred on the 20th of November, 1927, which was about a year and three months afterward?

A. Yes, sir.

Q. And you didn't take them for the purpose of treatment, [fol. 86] did you?

A. No, sir; I didn't take them for treatment at all.

Q. And you don't treat people, do you, Doctor?

A. I don't treat people, except X-ray.

Q. You mean you treat them when they are sent to you to give them X-ray treatment?

A. Yes, sir.

Q. Well, that is interradium treatment?

A. Yes, sir.

Q. I believe you said you were a graduate of what university?

A. St. Louis University Medical School.

Q. And when?

A. 1915.

Q. And since then you have specialized on X-rays?

A. I have specialized in X-ray since about 1920.

Q. So you have been specializing in X-rays thirteen or fourteen years?

A. Yes, sir.

Q. Now, when you first took this picture, did you find any other condition that he had?

A. No; that was practically all that I thought I could see at the time of the examination. I couldn't see anything else. I couldn't see anything in the way of fractures, of dislocations, or anything of that sort.

Q. Did you find in any other vertebra any other arthritic condition?

A. I don't think I did—that is, nothing to speak of. The eleventh thoracic was the one that really was the most involved.

Q. What did you call that, the eleventh thoracic?

A. Yes, sir.

Q. That was the one which was most involved?

A. Yes, sir.

Q. You didn't find any arthritic processes in the two vertebra below that, did you?

[fol. 87] A. No. His lumbar spine, I thought, I have always thought all the way through, was comparatively normal.

Q. You always thought that was comparatively normal?

A. Yes, sir.

Q. You did not find any abnormality on that?

A. No, sir.

Q. You say you are a physician?

A. Yes, sir.

Q. And you are able to interpret these X-rays?

A. I think so; yes, sir.

Q. What does hypertrophic arthritis come from?

A. Well, hypertrophic arthritis of the spine, particularly, is a conditions that may be due to numerous things. It may be due to infection, it may be due to injury, it may be due to changes in the glandular system, such as thyroid and pituitary and other glands of the body, and it may be due to what we speak of as metabolism, the building up or tearing down of the tissues.

Q. It may be due to disease?
A. Yes, sir.
Q. How long does it take those matters to develop, Doctor?
A. Well, as far as I can tell, it is very difficult to be sure about that, but, as far as I know, from my own experience, six months is the earliest time that they will show in an X-ray examination following a definite cause.
Q. Six months?
A. Yes, sir.
Q. You don't know whether he had those things that you find in those X-ray photographs before November 20, 1927, or not, do you?
A. I don't know, of my own knowledge; no sir.
Q. And the X-rays do not show?
A. They don't tell me that; no, sir.
[fol. 88] Q. They don't tell you how long it has been?
A. No, sir.

Mr. Davis: That is all.
Mr. Eagleton: That is all.

Questions by the Court:

Q. Doctor, before you leave the stand, give me the dates of those pictures. No. 2 was taken February 19, 1929, is that right?
A. Yes, sir.
Q. Nos. 3 and 4 when?
A. I think they were taken at the same time, February 19, 1929.
Q. Nos. 5 and 6?
A. They were taken on October 3, 1932.
Q. Nos. 7 and 8?
A. Nos. 7 and 8 were taken on October 2, 1933.

The Court: That is all.

Mr. Davis:

Q. You cannot tell, can you, the cause of this condition?
A. No, sir.

Mr. Davis: That is all.
Mr. Eagleton: That is all.

Witness excused.

Doctor F. G. Pernoud, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified, on behalf of the plaintiff, as follows:

Direct examination.

Questions by Mr. Eagleton:

Q. Will you please state your name to the Court and jury?

A. F. G. Pernoud.

Q. What medical school are you a graduate of?

A. Washington University.

[fol. 89] Q. What year?

A. 1907.

Q. What medical training have you had after your graduation?

A. I spent a period of about seven or eight years of interneship, and first assistant to noted surgeons in the city, before I practiced medicine for myself. Then I was connected in a surgical capacity with the Barnard Free Skin & Cancer Hospital, and since that time have been connected in a surgical capacity in a number of other hospitals, and I taught surgery in Washington University for a number of years, and practiced surgery just twenty-six years.

Q. At my request sometime in 1929, did you make an examination of this man for the purpose of determining his condition, so that you might testify here at the trials that we had around that date and since that time?

A. I did.

Q. When was the date of your first examination?

A. February 19, 1929.

Q. That is the same date that Doctor Peden made those pictures?

A. Yes, sir.

Q. Now, will you tell us what condition you found the man on examination on that date, from a surgical standpoint?

A. He gave me a history of the case, and I found that his whole spine, that is from the back of his neck clear down to his pelvis or hips behind, was more or less rigid, that all movements of his spine he guarded carefully at the time, and the range of motion, at that time, of the spine was inhibited and less than normal, and that there was tenderness on pressure all the way along the spine on that day, the loin muscles, one on each side of the spine that run from

the pelvis clear up to the neck, were dense and drawn tighter than his normal condition, which we doctors call [fol. 90] muscle cord. The whole medical picture was one of what we call arthritis of the spine, or hypertrophic spondylitis, which is the same condition.

Q. Would you mind explaining those terms, hypertrophic spondylitis—just what does that mean?

A. Well, arthritis means the inflammation of any joint anywhere in the body, but a hypertrophic spondylitis means an arthritis of the spine in which there are inflammatory conditions, particularly around the margins of the vertebra where they join one another and have a tendency to form a bone projection, particularly about the margins of the vertebra.

Q. Now, I believe you had various examinations made and various sets of pictures made by Doctor Peden, did you?

A. I referred this condition to Doctor Peden on three different occasions.

Q. You never had the man under observation for the purpose of treating him at all?

A. No, sir.

Q. What changes, if any, did you notice between your examination on February 19, 1929, and your next examination, which I assume was in October, 1932?

Mr. Davis: What kind of an examination?

Mr. Eagleton: His own examination, his physical examination.

A. October 3, 1932, was my second examination. I found that all the conditions were the same as of the previous examination. However, at my previous examination, I found a slight angulation of the spine at the point of the eleventh thoracic vertebra, that is, the angulation was such that the convexity was backward. On my examination of October 3, 1932, there was a slight lateral curvature of the spine with the convexity to the left at this same point; [fol. 91] that lateral curvature was due to an increased pull to the left line muscle on that side and was not due to any malformation of the spine, as I saw it. He had complained of some pain in his left hip at my first examination, but at this examination that tenderness had subsided. That covers that.

Q. Now, with reference to your most recent examination, what was the date of it?

A. October 6, 1933.

Q. And what was your findings, comparatively, then, with reference to the other two examinations?

A. Well, it was the same as the last examination. He had no complaint about his hips. He was still wearing a supporting corset, and all other conditions were about the same except that it appeared to me that there was more rigidity of the line muscles than on either of the previous examinations.

Q. What would account for the rigidity of the muscles?

A. That is a physical condition that takes place by nature where there is an inflamed condition under those muscles in the joints and spine that stiffens those muscles so as to fix the joints beneath them in the same manner that a doctor would put on a splint to fix a joint. Nature makes that same jacket.

Q. When you found this man in either of those examinations was he, in your judgment, able to perform manual labor which would entail the work of car inspector, that is, going up and down ladders on cars, and moving with agility on stepping or bending?

A. He could not.

Q. Why is that so?

A. Because of the great amount of pain that would be produced, because of the stiffening of his back. If he were [fol. 92] to do this over any period at all, the pain would become so excruciating that he might even faint or fall, because of the shock produced by pain.

Q. Doctor, assuming that he has suffered pain in his spine and back since the 20th of November, 1927, which happens to be six years ago today, and that pain has persisted all during that period, what would you say would be the prognosis as to the future? Do you say he will continue to suffer pain in those parts in the future?

A. He will.

Q. What is the fact with reference to whether or not you consider this condition a permanent condition, or whether it will get better or worse as time goes on in the future?

A. It is my opinion that it is a permanent condition and my judgment of the case. It has gotten worse in the years

that I have observed him, and it is my opinion that this active process will continue on.

Q. Doctor, assume that this man on the 20th of November, 1927, was not conscious of any pain or suffering or discomfort in any part of his anatomy, including his back and spine, and he went on a car, for the purpose of making an inspection, and fell 10 or 12 feet to the ground below, and thereafter and since that time he has continued to suffer pain in his back and spine; assume further than an X-ray picture taken within a short time after the accident—to be accurate, on December 3, 1927—revealed some hypertrophic arthritic deposits in his spine as of that date——

Mr. Davis: Now, wait a minute. There is no evidence of that.

The Court: Yes, there is evidence by Doctor Meinhardt that he took pictures, but they are lost.

[fol. 93] Mr. Davis: Yes, but he said that he took no picture of that point.

Mr. Eagleton: If the Court please, I don't want to mislead the Court, but the pictures I am speaking about were pictures which were taken not by Doctor Meinhardt, but by Doctor Zink. I understood that you wanted to read that evidence in the record.

Mr. Davis: You just make your own case.

Mr. Eagleton: All right: I will read the evidence into the record, of Doctor Zink.

The Court: That would not be admissible until Doctor Zink was not procurable.

Mr. Eagleton: Well, it was agreed between us that we could read from the formal bill of exceptions any testimony we wished to read. You don't wish to do that?

Mr. Davis: No, sir.

Mr. Eagleton: Then I will have to change the form of that question.

Mr. Eagleton (continuing):

Q. From December 3, 1927, and use the date of January 17, 1928, which would be about one month after the time Doctor Meinhardt first saw the patient, assuming——

A. (By the witness): Wait until I get that date.

Q. January 17, 1928, which would be a little less than two months after the accident, that then, at that time, there was some arthritic changes shown in the lumbar region, now,

with that sort of a history and that sort of a hypothesis, the absence of pain previous to this fall and the history of pain immediately, physically, in the lumbar spine, in the middle of his spine and in the upper part of his spine near the shoulders, I want to ask you what, in your judgment, part [fol. 94] the accident or fall had toward this pain that followed afterwards?

Mr. Davis: I object to that, Your Honor. It doesn't state facts. There is no evidence of changes in the parts complained of in Doctor Meinhardt's pictures.

Mr. Eagleton: I am not submitting them to you.

The Court: But you are submitting to him the X-rays of January 17, 1928?

Mr. Eagleton: Yes, sir; merely to show that there was such there at that time.

Mr. Davis: I don't think that they show that, Your Honor.

The Court: I don't think Doctor Meinhardt—I am trying to look at my notes—my memory is that Doctor Meinhardt's testimony of the X-rays of January 17, 1928, did not show what you indicate in that question, Mr. Eagleton.

Mr. Eagleton: Well, I better eliminate the pictures and ask him this question without reference to any X-rays taken immediately after this accident, but only the history of no pain or discomfort in any part of the anatomy in the period to November 20, 1927, and a history of pain since that time and continual pain at that time, the examination you have mentioned and the region you have mentioned, what, if any, part would you say that this accident, or injury, had in it?

Mr. Davis: I don't think that is a proper question. If it please the Court. He would make that a definite question.

The Court: Yes, if that is required, it should be more definite.

Mr. Eagleton: I want to get Your Honor's ruling. I didn't get it.

[fol. 95] The Court: Well, as you went along, I got it that you referred, it would seem, other X-rays might show. You would have to restate those things, if you want to have the hypothetical question in the correct form.

Mr. Eagleton: What I am attempting to do is to show what the injury would be in this particular case, what it would cause in this particular case.

Mr. Davis: What it could cause?
Mr. Eagleton: Yes.

Mr. Eagleton (continuing):

Q. Doctor, aside from X-rays, excluding them entirely, assume that a man on November 20, 1937, was free from pain, was performing his usual functions of a car inspector, working eight hours or more a day, has this fall, and later you examined him in 1929, again in 1932, and again in 1933, and find the conditions you did find, that is, the condition in the soft structure, the muscle pull, and the increased activity in the last examination, what, in your judgment, part does this accident and fall have in producing those conditions you found?

Mr. Davis: Now, Your Honor, he can make that a definite question. I don't think that contains all the facts in the case. The question itself permits the Doctor to speculate and guess and state conclusions rather than an opinion from the facts.

The Court: You haven't expressed all the facts. You have abbreviated it too much, and you have left out some matters, as it occurs to the Court, that you should have included. Just state the condition this man was in on the 20th of November, 1927, what the doctors have said as to his having an arthritic condition at that time.

Mr. Eagleton: The reason I eliminated that was in an-
[fol. 96] swer to his objection. As I understand the rules to be, you cannot base an opinion on an opinion.

The Court: No, the objection wasn't based on that at all; at least, I didn't so understand Mr. Davis' objection.

Mr. Eagleton (continuing):

Q. All right. On November 20, 1927, this man is not suffering any pain or discomfort in performing his work up until the time of this injury, in a normal way, apparently, had an arthritic condition in his system sufficient that two months after the accident it showed its deposit on an X-ray plate in the lumbar region——

Mr. Davis (interrupting): Showed what?

Mr. Eagleton (continuing):

Q. Showed its deposits in an X-ray that time taken by Doctor Meinhardt in January, 1928. Since that time, down

to the present time, he has continued to have pain, and the muscle pull has become greater, as you testified. I want to know, now, what part, in your judgment, the accident and fall had in producing this condition that you described?

Mr. Davis: We object to that, because he again brought in the X-ray plate of Doctor Meinhardt, and Doctor Meinhardt's X-ray did not show anything, because he said, "In my recollection, it was a diseased condition, a condition that could not have happened in that short length of time from the accident."

The Court: Well, it is not claimed that the accident caused the condition of arthritis discoverable in January, 1928?

Mr. Davis: No, sir; I say it is not. Now, he is asking him about this——

[fol. 97] Mr. Eagleton (interrupting): I am not saying a word about the cause of it.

The Court: He may answer.

The Witness: My opinion that the violence which he sustained—I mean by that the violence of the spine activity was re-inflamed, or re-enacted the arthritis of the spine.

Mr. Davis: Now, we object to that. There is no evidence here that he had arthritis of the spine, except the things that he said had nothing to do with his present disease. That is the way I understand it.

The Court: Overruled.

To which action of the Court, the defendant, by its counsel, then and there at the time, duly objected and excepted, and still continues to object and except.

Mr. Eagleton: I think that is all, Doctor.

Cross-examination.

Questions by Mr. Davis:

Q. You say you examined him on February 19, 1929?
A. Yes, sir.
Q. And also October 3, 1932?
A. Yes, sir.
Q. And October 6, 1933?
A. Yes, sir.
Q. Now, you haven't treated him, have you, Doctor?
A. No, sir.

Q. You didn't examine him with the intention of treating him?

A. No, sir.

Q. You examined him for the purpose of testifying, did you?

A. Yes, sir.

Q. And you examined him at the instance of Mr. Eagleton?

A. Yes, sir.

[fol. 98] Q. And you look to Mr. Eagleton to pay whatever bill you have?

A. Yes, sir.

Q. And you testified in the Wabash case, didn't you?

A. I testified twice previously in this case, I think; if that is what you allude to?

Q. Yes, sir. And your time, you charge Mr. Eagleton for testifying?

A. Yes, sir.

Q. And Mr. Eagleton has paid you, has he?

A. I have no record of whether it is paid or not.

Q. Now, Doctor, in your opinion, could this man drive a motor car?

A. Do you mean an ordinary passenger automobile?

Q. Yes.

A. He could for certain periods of time. He couldn't do it consistently day after day, nor could he do it for an entire day except at the expense of considerable pain.

Q. Could he drive it if his condition becomes ankylosed? Could he drive it then without pain?

A. It depends on what you mean by "this condition become ankylosed." If the spine became ankylosed from the part above and then clear down to his sacrum, then he should be—unless all of the vertebrae ankylosed, he couldn't do it except at the expense of pain.

Q. He would have pain in the other vertebrae, even though they were not affected?

A. No, if the other vertebrae were not affected, he would have no pain there, but it is my opinion that the others are—that is, some of the others are.

Q. Which ones?

A. Well, we speak of it as clinically true that, even though we are able to put our finger on only one place as the tenth or eleventh, we have the opinion, from a clinical [fol. 99] knowledge in those cases, that other vertebrae are

lso inflamed, even though they don't show bony deposits.
Q. They don't show?
A. They don't show sometimes on the X-ray plate, but hey do show clinically.
Q. He might drive a motor car, though, in your opinion?
A. Oh, yes.
Q. And what other work could he do?
A. Well, he might do most any type of work that did not ntail strong, physical labor in working, lifting or that ctivity. He might do considerable work for periods of ime. He would not be able, however, to do any job of abor that would entail eight hours' work day after day.
Q. Do you mean by that that he couldn't hold any job that ntails eight hours' work a day?
A. I didn't say that. I said any job of manual labor eight ours a day.
Q. He could do other things, though?
A. There are certain other things that he might be able o do. However, even if he had to stay at a position of some esk job, or change jobs for eight hours a day, it would be t the expense of lots of pain.
Q. Now, lots of people stay at a desk eight hours a day, n't that true?
A. I don't think so.
Q. You really think that?
A. Yes, sir.
Q. Don't you think that a great many people have pain tting down?
A. Yes, sir; I would say that is true, but I would not say ie majority would.
Q. But he could do this work?
A. I made two different statements.
Q. You said he could not do manual labor eight hours day?
A. Yes, sir.
Q. But he could do some work?
A. There are some kinds of work he could do, but I qual-
ol. 100] ified that by saying that he couldn't do that eight urs a day, without an extreme amount of pain; but I ven't in mind any particular job that he could do eight urs a day, six days a week for the entire year.
Q. So you don't say now what you said a while ago?
A. No. I have the same thought in mind that I had fore.

Q. Now, you say this man suffers pain?

A. Yes, sir.

Q. What is pain? Can you see pain?

A. No, sir; but you can see evidence and expressions of pain; but pain, as I understand it, is invisible.

Q. That is what you call subjective signs?

A. No, I don't think that is subjective. I think a doctor can tell when a person has pain; for instance, if you see a man lying in the street with a leg cut off, you can be reasonably assured that he has pain, as in many instances you cannot tell that a man has pain; for instance, I may say I have a headache, and I may be truthful about it or may not, but you cannot tell; but in extreme headaches the eyes become blurry and there is an unconscious pinching about the face that a doctor could say, with reasonable certainty, that that man has a headache.

Q. I think so myself, Doctor. Now, you say this man suffers pain?

A. Yes, sir; he does.

Q. All the time?

A. I would not say all the time. I think with the proper rest, probably in bed, that he has no pain lying there. When lying—it is my opinion that this man would not be in pain at all in a reclining position, after he has had a good rest, but it is my impression that if he were lying in bed for a considerable period of time, he would still have pain.

Q. And it is your opinion that he suffers pain?

[fol. 101] A. It is my opinion that he was suffering pain at the time of my examination.

Q. When, Doctor, February 19, 1929?

A. Yes, sir.

Q. And October 3, 1932, he was suffering pain?

A. He was.

Q. And October 6, 1933, he was suffering pain?

A. Yes, sir.

Q. You think on all those three occasions he was suffering pain?

A. Yes, sir.

Q. How could you tell?

A. As evidenced by the tension and the muscle cord of the line muscles.

Q. Did you see it in his eyes?

A. Well, it may have been there, but I didn't need that to tell me.

Q. And you said if there were blurry eyes you could tell?
A. Not in all cases.
Q. Well, if he was suffering severe pain?
A. Yes, sir.
Q. And was he suffering very severe pain when you saw him?
A. Yes, sir; on all three occasions.
Q. You didn't notice his facial expression?
A. I didn't look at his face.
Q. Well, if he was suffering severe pain, you could have told it in his face?
A. No, sir; I don't think so in all instances.
Q. But you could in some?
A. Yes, sir.
Q. And don't you think, if he was suffering severe pain, he would have shown it there?
A. Not necessarily.
Q. What causes arthritis?
A. There are many causes of arthritis. Various diseased conditions will do that, or various disfunctions of the glandular secretions will produce arthritis, or various faults in the burning up processes of the body, or what we [fol. 102] call metabolism, and infections diseases produce them and injuries produce them.
Q. All those things produce arthritis?
A. Yes, sir.
Q. And how long does it take this arthritic condition to develop, Doctor?
A. Well, they may develop at any point of time, from instantaneous to weeks or months thereafter.
Q. Do you think they could develop instantaneous?
A. Yes, sir; if a person should bruise, for instance, their knee along the joint he instantly has arthritis.
Q. Do you mean by that—I am speaking of the back, doctor, that they throw out those little spurs immediately?
A. Oh, no; that is of longer time.
Q. You are not getting off the track?
A. No, we are talking about arthritis.
Q. And this condition he has in the back, how long would it take that to show?
A. Do you mean the spurs that were shown on there?
Q. Yes, sir.
A. Spurs would develop, it is possible to see them three

weeks after the beginning of an arthritis. However, in other cases——

The Court: After the beginning, of course, but how long after the beginning?

A. Three weeks after the beginning of an arthritis. For instance, if a person had arthritis on the first day of the month, it would be possible in three weeks, on the 21st of the month, to see bony processes. However, it usually takes much longer than that time.

The Court: How much longer?

A. Your Honor, sometimes the deposits doesn't show for a period of a year or more.

The Court: What do you mean when you say that metab-
[fol. 103] olism may produce arthritis?

A. That is the breaking up and down of the feed substances within the body; the burning or oxidation of food substances in the body, sometimes produces an inflammatory condition that will also show bony deposits the same as you see in those infections.

Mr. Davis (continuing):

Q. Doctor, isn't it understood at the present time that, generally speaking, it is not injury that causes arthritis?

A. Yes, sir; generally speaking, I will say that there are more cases of arthritis develop outside of injury than with injury. However, many cases of arthritis are the result of injury, and a greater number of cases of arthritis are the result of disease.

Q. This arthritis, the plaintiff's condition, could have resulted from disease, could it not?

A. The original arthritis could have resulted from disease.

Q. And it probably did, did it not?

A. I believe, if I were allowed to speculate from what I heard and the history of the case——

Q. No, from your own knowledge and your examinations?

A. Well, I would have to take into consideration the other facts. I would say that the original arthritis was the result of some unknown thing to me. However, I would presume that it was some diseased condition, but I am not sure; it may have been any one of a number of things, which I mentioned, that produces arthritis.

Q. And it could have been any of the number of things you mentioned?

A. Yes, sir.

Q. And it could have been from metabolism or infection?

A. Yes, sir.

[fol. 104] Q. And the other things you mentioned?

A. Yes, sir.

Mr. Davis: That is all.

Redirect examination.

Questions by Mr. Eagleton:

Q. Doctor, so as to make it a little more clear, it looks to me those spurs that you find are simply an evidence of a pre-existing condition?

A. Yes, sir.

Q. But arthritis, when it starts it spurs, beginning some time certain?

A. Yes, sir.

Q. And when you say it may show in a week, you mean X-rays taken three weeks after the arthritis is started it may show?

A. Yes, sir; but the bony spurs as seen on the X-ray may be seen at the very earliest at three weeks.

Q. Now, do you find persons who have arthritic deposits on their spine to the extent mentioned here can go through life absent any trauma or activating or exciting cause without experiencing any discomfort or disability? I will reframe that question: Doctor, can a person have arthritic deposits in his spine without the necessity of suffering pain? Can there be such without causing pain?

A. Yes. When those deposits are very small and do not interfere with the normal ranges of motion it is entirely possible for an individual to have those deposits of the spine and not have pain.

Q. Where a person has no injury to excite any such condition that may exist, do they, at times, go through life without suffering pain?

Mr. Davis: Now, we object to that question. I don't think it is entirely a proper question.

Mr. Eagleton (continuing):

Q. Let me ask it this way, Doctor: What is a dormant condition of arthritis?

[fol. 105] A. Well, a dormant condition of arthritis is a case where an individual has arthritis, which is an inflammation of a joint, and, if we are speaking of the spine, then it is an inflammation of one of the joints of the spine where the active processes are arrested.

The Court:

Q. Do you mean that there is no curve?

A. The active processes are arrested. There may be a curve.

The Court:

Q. No, no. Do you mean where there is no curve and reaches that stage of arthritis and stops?

A. There may be no stage of curve along the spine, but then it stops and is dormant.

Mr. Eagleton (continuing):

Q. Now, what effect does trauma have in those cases?

A. It usually lights up the infection.

Mr. Davis: We object to what it "usually" does. It is what it did.

The Court: Yes, I think that is true.

Mr. Eagleton: All right. That is all.

Recross-examination.

Questions by Mr. Davis:

Q. Now, you say you could have extraneous, and spurs on here and a dormant condition?

A. Yes, sir.

Q. And then this may make it active again?

A. Yes, sir.

Q. Or infection could make it active?

A. Yes, sir.

Q. Or anything may make it active that causes it in the first place?

A. Yes, sir.

Q. And you didn't see any X-rays taken before February 19, 1929, did you?

A. No, I saw no X-rays; I saw X-ray reports that were made before that time.

Q. You saw no X-rays at all, did you?

A. No, sir.

[fol. 106] Q. So you don't know this man's condition at all before?

Mr. Eagleton: Of your own knowledge?

Mr. Davis (continuing):

Q. Yes, of your own knowledge before that injury?

A. No, of my own knowledge. All I know of this man is what I observed by my examinations, as I stated, the first February 19, 1929——

Q. That is what I say, you don't know what his condition was before November 20, 1927?

A. Except what he told me and the history of the case.

Q. I say, of your own knowledge, you don't know?

A. We doctor's generally accept that.

Q. No, of your own knowledge?

A. Of my own knowledge, I know nothing prior to my first examination.

Q. You don't know what could have caused this condition, do you?

A. No, I have no opinion of the cause of his original arthritis.

Mr. Davis: That is all.

Further redirect examination.

Questions by Mr. Eagleton:

Q. And by "original arthritis" you mean that arthritis that antedated before November 20, 1927?

A. Yes, sir.

Mr. Eagleton: That is all.

Further recross-examination.

Questions by Mr. Davis:

Q. And since November 20, 1927, you don't know what caused the condition you find at the present time of the tenth, eleventh and twelfth thoracic vertebrae, do you?

A. Yes, I think I do.

Mr. Davis: That is all.

[fol. 107] Further redirect examination.

Questions by Mr. Eagleton:

Q. What is it?

A. I think it is a condition that was aggravated by his injury, which he says was November 20, 1927.

Mr. Eagleton: That is all.

Further recross-examination.

Questions by Mr. Davis:

Q. But you don't know that?

A. I think I do; yes, sir.

Q. But you think it could be caused by something else?

A. No, sir; from the history of the case and the history following it, I definitely fix his injury of that date.

Q. Of November 20, 1927?

A. Yes, sir.

Q. Now, what do you base that on?

A. I base that on the fact, on the history of the case. He stated he had never had any——

Q. (Interrupting.) Is that on the history of the case?

A. Well, the history of the case and the facts of the case. Of course, that all gives a personal knowledge. My personal knowledge dates from February 19, 1929.

Q. Yes, and you don't know anything about it before that time?

A. Except from the history of the case, and, as far as we doctors are concerned, that is good information.

Q. You don't know how long that had been there, do you?

A. No, sir.

Q. And you couldn't tell?

A. No, sir.

Q. As to how long the condition that you found on February 19, 1929, as to the tenth, eleventh and twelfth [fol. 108] thoracic vertebrae?

A. No, sir; I have no way of knowing.

Mr. Davis: Well, Your Honor, if he bases it on those other things, I ask his testimony be stricken out, if he bases it on the history of the case.

Mr. Eagleton: Assuming that history was given, then it should not be stricken out.

The Court: I gather, from what he said, that the history of the case left it in doubt, whether he based it on what he told him; he hasn't stated on which history, either or both he has based his opinion. He would not be permitted to rest it on the history given by the plaintiff. You better clear that up, gentlemen.

By Mr. Eagleton:

Q. Doctor, was the history that was given in the hypothetical question as propounded to you?

Mr. Davis: That is leading, Your Honor.

The Court: Well, I will let it be so. I want that cleared up.

By Mr. Eagleton:

Q. Doctor, was the question that I propounded to you in evidence, the fact that this man was working eight hours a day in the regular capacity, without suffering any pain prior to this fall on November 20, 1927, was that history, any of it, based, or is that history of itself sufficient for you to form the opinion you expressed?

A. It is.

Mr. Eagleton: That is all.

Mr. Davis (continuing):

Q. Then, what did you mean when you said you based it on the history the plaintiff gave you?

A. We doctors take into consideration everything possible [fol. 109] with the history included. We take all the facts of sisters and brothers, and we accumulate everything we can.

The Court: Well, you are not allowed to do that here, so that you must confine your opinion, Doctor; unless you do confine your opinion, I will not allow it.

A. I could confine my opinion to the statement Mr. Eagleton made, that this man was free of pain and working up to a certain time and then he had this series of conditions develop afterward, I would say then that the activating of that arthritis started at that one time.

The Court: Any further questions?

Mr. Davis: Yes. I ask that be stricken out, because he based it upon what the plaintiff told him.

The Court: Now, that we may have no possible misunderstanding, read his answer.

(The reporter reads the last answer which is as follows: "I could confine my opinion to the statement Mr. Eagleton made, that this man was free of pain and working up to a certain time and then he had this series of conditions develop afterward, I would say then that the activating of that arthritis started at that one time.")

The Court: The motion to strike will be overruled. Did you hear this answer read?

Mr. Davis: No, sir.

The Court: Well, read it again.

(The reporter again reads the last answer.)

Mr. Davis: Yes, I understood the answer to which I think this motion was addressed, and I think the testimony is contradictory.

The Court: That is for the jury to say, whether this [fol. 110] testimony is contradictory. Is that your motion to strike?

Mr. Davis: Yes, sir.

The Court: The motion to strike will be overruled.

To which action of the Court, the defendant, by its counsel, then and there at the time, duly objected and excepted, and still continues to object and except.

Thereupon, the Court duly and properly admonished the jury as to the proper conduct of its members while court should not be in session, and the court then took a recess of ten minutes on the same day.

At which day and hour court was duly reconvened and, the jury being present as before, the following proceedings were had, to-wit:

Mr. Eagleton: If the Court please, the plaintiff desires to formally offer all plaintiff's exhibits from 1 to 8, inclusive, and with that the plaintiff rests.

Thereupon the plaintiff rested his case.

DEFENDANT'S MOTION FOR INSTRUCTED VERDICT

Thereupon the defendant, by its counsel, presented to the Court in writing, and asked the Court to give to the jury as instruction in the nature of a demurrer at the close of plaintiff's case, in the words and figures as follows, to-wit:

"At the close of plaintiff's case the Court instructs the jury that under the law and the evidence the plaintiff is not entitled to recover and your verdict must be for the defendant."

Which said instruction the Court, upon consideration thereof, refused to give to the jury at the request of the defendant.

[fol. 111] To which action of the Court, in so refusing to give to the jury said instruction at the request of the defendant, the defendant, by its counsel, at the time duly objected and excepted, and still continues to object and except.

Defendant's Evidence in Chief

Thereupon, the defendant, to support the issues in its behalf, offered and introduced the following evidence, to-wit:

DOCTOR LEO A. WILL, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified, in behalf of the defendant, as follows:

Direct examination.

Questions by Mr. Davis:

Q. State your name, please.
A. Leo A. Will.
Q. You are a physician and surgeon in the City of St. Louis?
A. Yes, sir.
Q. Do you live in this city?
A. No, sir.
Q. In St. Louis County?
A. Yes, sir.
Q. Of what school are you a graduate?
A. St. Louis University School of Medicine, 1910.

Q. Have you been practicing since then?
A. Yes, sir.
Q. Do you specialize in anything?
A. General surgery.
Q. Does that include bones of the body?
A. Yes, sir.
Q. Are you a member of any medical society?
A. Yes, sir.
Q. What society?
[fol. 112] A. The local City Medical Society, the St. Louis Surgical Society, the State Medical Society, the American Medical Society and the College of Surgeons.
Q. Are you a member of any hospital board in this city?
A. Yes, sir.
Q. What one?
A. Surgical staff of St. John's Hospital, the Deaconess and the St. Louis County Hospital.
Q. Do you remember examining Thomas J. Brady?
A. Yes, sir.
Q. When did you first examine him?
A. February 18, 1929.
Q. February 18, 1929?
A. Yes, sir.
Q. Where did you examine him?
A. In my office.
Q. And what did you find on your examination at that time? What did you examine him for? What did he complain of, first?
A. He was complaining of his back, nervousness, pain in his left hip, headaches and soreness through his chest.
Q. Did you examine him for all those?
A. Yes, sir.
Q. Did you take X-rays of him?
A. Yes, sir.
Q. Now, state what you found with respect to his back, Doctor.
A. There were no gross abnormalities about his back, with the exception that there was a slight increase of the anteroposterior curve of the dorsal spine, that is, the patient being slightly stooped.
Q. That is, the patient was slightly stooped?
A. Just a little; yes, sir. The movements of his spine were present in all normal directions. There were no

definite fixed points, there was no palpable bony abnormalities and no definite points of localized tenderness. He complained of discomfort, however, in the lumbar region.

[fol. 113] Q. Where is the lumbar region?

A. The small part of the back; and the posterior aspect of his pelvis, just down in the region of his small portion of the back. Various clinical tests, such as flexing his thighs on the abdomen——

Q. (Interrupting.) What do you mean by that?

A. With the patient lying flat on his back, pressing his thighs on his abdomen and extending his lower limbs, those tests were executed to their normal extent with no back pain and no evidence of lumbar muscle spasm during those executions. Movements of the lower extremities were accomplished in the normal fashion, with the patient lying on his back with his limbs straight and moving the extremities, that is, outward and upward and backward, and they were accomplished to the normal and were the hyper-tests of the extremities. By that I mean putting the patient on his abdomen and extending the knee outward. That test was applied and failed to elicit any spasm in the back. At the time I saw him, he was wearing a body jacket, which he removed. That was the extent of the physical examination of his back.

Q. Now, did you make an X-ray examination of the back?

A. I did.

Q. And what did you find?

A. The X-ray examination showed some hypertrophic changes to the upper margin of the fourth lumbar vertebra.

Q. Where is the fourth lumbar vertebra?

A. Down in the small of the back; and then, as I remember it, there was also some hypertrophic changes noted in the region, I think, of the fourth dorsal, high up in the back.

[fol. 114] Q. Where is that?

A. That is up between the shoulders.

Q. Just point it out to me.

A. All right. In that region (pointing); and the other hypertrophic changes was down in the lower lumbar region, the small of the back.

Q. Could you tell how long that was there?

A. No, I couldn't say. That had at least been three for a period, in all probability, of months, or, possibly, a year,

probably years, several years, but at least longer than six, eight, ten or twelve months.

Q. Now, what else did you find on that examination with respect to the X-rays, I mean?

A. That was all.

Q. Now, did you examine his head, Doctor?

A. I did; yes, sir.

Q. What did you find with respect to his head?

A. There was nothing abnormal about his head. He complained of some tenderness, on pressure, over the back of his head, but there were no objective findings about the head.

Q. What was the cause of that, Doctor?

A. He complained of tenderness over the back of his head. I found no bumps or soreness to account for it.

Q. Would the condition in the back account for it?

A. No, sir.

Q. Would hypertrophic arthritis cause that?

A. If a man had hypertrophic arthritis that was extensive enough, it would cause pain in the back of his head.

Q. Did you examine his hip?

A. Yes, sir.

Q. What did you find with respect to his hip?

A. I found nothing in the examination of his hip or hips, or lower extremities, by way of objective signs of injury, that is, there was no swelling or atrophy or limitation of [fol. 115] motion, or any physical findings that I could put my finger on, nothing we call objective findings.

Q. What is pain, Doctor?

A. What is pain?

Q. Yes. Can you tell whether a man has pain, as a general proposition?

A. No, very frequently we cannot. We can only take the individual's talk for the fact that he has pain. But, in certain instances, where they have certain types of pain, they frequently have certain physical findings to let you know that they have pain.

Q. Now, did you find anything as to his back that would lead you to believe that he had pain in the back?

A. No, sir.

Q. Well, with respect to spasms?

A. Well, if you are speaking of pain in your back as a result of some injury or disease of the spine, if a man

has pain he should have some muscle kick, or muscle spasm, thrown out to protect himself, which can be elicited.

Q. What do you mean by muscle spasm?

A. A contraction of the muscles, a fixation of the muscles that try to immobilize the part.

Q. That means a -witching, does it?

A. Not necessarily twitching. It may be quite a stiffening up of the muscles. Instead of being pliable, the muscle becomes stiff.

Q. What did you say you found with respect to muscle spasm?

A. I found no muscle spasm.

Q. You did not?

A. I did not.

Q. Now, have you your X-rays taken on February 18, 1929?

A. If they are not in court here, I have. I am not sure. Those have all been taken in 1933. I have no 1929 films.

[fol. 116] Q. Now, Doctor, you examined him in 1933, did you?

A. Yes, sir.

Q. And when?

A. I examined him on September 26, 1933.

Q. What did you find with respect—on September 26, 1933?

A. Do you mean in the physical examination?

Q. Yes.

A. Essentially the same as the time of my previous examination, with the exception that the last examination he weighed 153 pounds, and at the previous examination he weighed 125 pounds.

Q. What would you say with respect to his nourishment?

A. It is stated his nutrition was good, he was well nourished.

Q. Now, with respect to a limp, what did you find?

A. He was using a cane in 1933. He carried a cane, but I didn't detect a limp in 1929. He was limping——

Q. (Interrupting.) What did you find with respect to nervousness in 1929?

A. I took his reflexes at that time, and there were no changes in his reflexes.

Q. What do you mean by "reflexes"? So the jury may understand.

A. The tapping on various tendons and the muscles of his abdomen, scratching them to see whether there were any organic change in his nervous system. I found none at that time.

Q. September 26, 1933, what do you say with respect to his nervousness?

A. There was no outward manifestation while he was in my office, and his reflexes were still normal.

Q. Did you examine his eyes with respect to the action of light and condition?

A. Yes, sir.

Q. What did you find?

A. They were normal.

[fol. 117] Q. With respect to his chest, what did you find?

A. Normal.

Q. And with respect to his abdomen.

A. Normal.

Q. Now, what did you find with respect to his spine and pelvis on September 26, 1933?

A. He was wearing a body jacket. The contour or shape of the spine was the same as it was previously. He still showed that slightly stooped position.

The Court: What do you mean by a "body jacket?"

A. A celluloid, or a jacket made of some sort of material that comes from underneath the arm pits and down over the pelvis and loins, and it was upward——

The Court (interrupting): All right.

A. Movements of the spine at that time were present in all directions and, I believe, to their normal extent.

Mr. Davis (continuing):

Q. What do you mean, "in all directions"? Did you test him?

A. By lateral movements, backward and forward movements, by testing and observing him.

Q. You did all this? Now, what do you say with respect to it?

A. They were, I felt, within the normal. He complained of tenderness on light touch, or palpation, throughout the entire dorsal or lumbar spine. There were no fixed points.

Q. What do you mean by that?

A. There was no point that you could say was fixed.

You could find no point where there should be movement where there was no movement.

Q. All right.

A. The various clinical tests that he was put through before, such as extension of the thighs on the abdomen and hyper-extension of the extremities, were executed again and I was unable to find any definite clinical evidence of [fol. 118] a back injury, that is, there was no spasm or anything to point to any definite injury in the back.

Q. Now, with respect to his nervousness?

A. There was no outward evidence of nervousness, and his reflexes were normal.

Q. With respect to his head, did you find anything, did he complain?

A. He was only complaining of headaches, and there was nothing, no objective findings about his scalp or his skull.

Q. Now, with respect to his hip?

A. Normal. I found nothing in the way of injury or disease.

Q. Was he complaining of his hip?

A. No—(reading) "Back and hips," yes, he was complaining of his hips, but the normal range of motion was present in his hips, and there was no swelling or atrophy or wasting of muscles, or anything of that sort, involving either lower extremity.

Q. Did you find anything of any evidence of any fracture or bone deformity?

A. No, sir.

Q. You also took X-rays, did you?

A. I did; yes, sir.

Q. When?

A. On September 26, 1933.

Q. And have you those X-rays with you?

A. Yes, sir.

Mr. Davis (addressing the reporter): Mark these Defendant's Exhibits A, B, C, and D.

(The reporter marked the X-rays referred to as Defendant's A, B, C, and D.)

Mr. Davis (continuing):

Q. I hand you Defendant's Exhibit A, and ask you what that is?

A. That is an X-ray picture of the twelfth dorsal and all of the lumbar vertebræ and the upper half of the sacrum.

Q. Of whom?

A. Thomas J. Brady.

[fol. 119] Q. When was that taken?

A. September 26, 1933.

Q. Does that show any abnormalities, Doctor?

A. No, sir.

Q. By "abnormalities" you mean it is normal, is it?

A. It is a normal-appearing spine to me.

Q. And that is a picture taken of his spine, is it?

A. It is.

Mr. Eagleton: That is where on the spine?

A. The twelfth dorsal and the entire lumbar spine and the upper half of the sacrum.

Mr. Davis (continuing):

Q. That is from the middle of the back to the lower part of the back?

A. Yes, sir.

Q. Now, here is Defendant's Exhibit B, and I will get you to state what that is?

A. That is an X-ray picture of the first and second and a small portion of the third lumbar, the twelfth, eleventh, tenth, ninth, eighth, seventh, sixth, fifth, fourth, third, second dorsal.

Q. Does that include what is known as the thoracic vertebrae?

A. Yes, sir; dorsal and thoracic mean the same.

Q. So that includes all of the tenth, eleventh and twelfth thoracic, or dorsal, vertebrae?

A. It does; yes, sir.

Q. Now, that was taken September 26, 1933?

A. Yes, sir.

Q. What, if any, abnormality is shown on that?

A. It shows some hypertrophic changes in the lower margin of the eleventh dorsal, or thoracic, more pronounced on the right side than on the left.

Q. And what is the condition of that, Doctor?

[fol. 120] A. Well, it just shows two small hypertrophic spurs on the lower margin of that vertebrae.

Q. And, with respect to its severity, what would you say about it?

A. Moderate changes.

Q. Would they—X-rays taken on February 18, 1929, did they show any spurs?

A. The eleventh dorsal was not shown on my previous plates. The X-ray examination in 1929 that I made showed the dorsal spine from the first to the tenth, inclusive.

Q. And did you find anything with respect to the tenth on that?

A. No, sir.

Q. Did you find anything with respect to the tenth thoracic, or dorsal, vertebrae—did you find any processes on that?

A. No, sir; not on the tenth.

Q. Anything abnormal with respect to it?

A. No, sir—in 1929 you are talking about?

Q. Yes, sir; 1929. You found nothing abnormal about the tenth dorsal vertebra then?

A. That is right.

Q. Now, I show you Defendant's Exhibit C and ask you what that is?

A. That is a lateral view of the lumbar spine and sacrum of Thomas J. Brady.

Q. And taken on September 26, 1933?

A. Yes, sir.

Q. Now, is there any abnormalities shown in that?

A. Well, I would say that that can be classified within the normal.

Q. And what does that show?

A. It shows the bodies of the vertebrae to be normal in width and shape and position.

Q. With respect to what vertebrae?

A. The fifth lumbar to the third; the second, the first, the twelfth and eleventh dorsal are rather hazy, they are not of much diagnostic value.

[fol. 121] Q. I hand you Defendant's Exhibit D and ask you what that is?

A. That is an X-ray picture of the patient's entire pelvis, showing both hip joints and the fourth and fifth lumbar vertebrae and a portion of the third lumbar.

Q. Now, those lumbar vertebrae are from the small of the back down?

A. Yes, sir.

Q. And that shows the pelvis and hips?

A. Yes, sir.

Q. Do you see any abnormality in that picture?

A. No, sir; I would classify that as within the normal.

Q. Now, Doctor, you say he was wearing a jacket, or brace, I believe?

A. Yes, sir.

Q. And what was that made of?

A. Well, all I have in my record is that he was wearing a jacket, or brace. I didn't specify whether it was made out of celluloid or what kind of material, I don't remember.

Q. Could you say, in your opinion, after an examination made of him, whether it was necessary for him to wear such a jacket?

A. I could find nothing in my examination that would lead me to apply a brace to him, or to find any definite reason for him wearing a brace.

Q. Doctor, I will get you to look at that tenth, eleventh and twelfth dorsal vertebrae again, and I believe you said the spurs on there were moderate?

A. Moderate, yes.

Mr. Eagleton: I understood he said the spurs on the eleventh?

A. I said that the eleventh dorsal vertebrae was the one that had the spurs on it, the eleventh dorsal, that they are more pronounced on the right than on the left side.

Mr. Eagleton: You didn't find any on the tenth?

A. I find no definite spurs on the tenth or the twelfth [fol. 122] dorsal vertebrae; no, sir; you might say that the upper margin of the tenth on the right side may be a little sharp, but I don't believe in it enough to say that there was any hypertrophic change in it. I would say that the tenth and twelfth were normal, but the eleventh does show those hypertrophic spurs.

Mr. Davis (continuing):

Q. Do you know how long that had been there?

A. I could only say that it is a question of months or several years.

Q. Do you call that disease hypertrophic arthritis?

A. I don't call it hypertrophic arthritis. I call it hypertrophic spurs.

Q. And do they change to ankylosis?

A. If they continue to grow and grow over the two vertebrae, you see, they form ankylosis.

Q. How long does it take ankylosis to develop, Doctor?

A. That depends upon the individual case.

Q. Can you see any evidence there of an ankylosis?

A. No, sir.

Q. Doctor, in your opinion, is this man able to work?

A. I could find nothing in my physical or X-ray examinations to account of any inability to work.

Q. With respect to manual labor, in your opinion, could he do manual labor?

A. I found nothing to stop him.

Q. Well, what do you say? Do you think he could or could not?

A. I think he could; as far as my physical examination and X-ray examination goes, I think he could.

Q. Do you think he could do labor as a car inspector?

A. Yes, sir.

Q. Climb up on cars?

A. Yes, sir.

Q. Doctor, what are those hypertrophic—could disease [fol. 123] cause those hypertrophic spurs?

A. That is a very much mooted question. Some men think that they are the result of infection, that is, some focal infections of teeth, tonsils, gall bladder, or what have you, and some others think that infection causes no part of it, that they are due to the wear and tear of those particular parts due to the occupation a man follows and are particularly noted in certain aged periods, in other words, they are very common after the age of forty years in men who do hard, laborious work; they are less common prior to forty; prior to thirty, they are fairly rare; they are occasionally seen from thirty to forty, so they are the rule rather than the exception, and they are due to nothing more than chronological changes and the wear and tear of that particular part of the body.

Q. What is your opinion, Doctor?

A. I would think, personally, that they are chronological age changes, due to the ordinary wear and tear on our bodies.

Q. Are you able to tell, in your opinion, what causes this man's condition?

A. What causes his condition?

Q. Yes, sir; by those hypertrophic spurs, could you tell what they are due to?

A. No, I cannot tell you positively.

Q. Well, your opinion?

A. My opinion is that they are, in all probability, due to the man's age and particular type of occupation. The chances are in ten years from now, if his back is X-rayed, you will see more of them; that is, you will in any laboring man, who is doing hard laboring work and hard bending. The common thing for these men to do is to use some correctural apparatus.

Q. By that you mean, if they show those things—do you [fol. 124] mean with regard to this one vertebrae or others?

A. I say, if you X-ray this one vertebrae, you will find the spurs more pronounced then than you do at this time, and if the man is working you may find more of them on other vertebrae, and there may be no change at all.

Mr. Davis: That is all.

Cross-examination.

Questions by Mr. Eagleton:

Q. You say that on the X-ray, which Judge Davis handed you, last taken, that it shows some spur formation on the eleventh dorsal vertebrae?

A. Yes, sir.

Q. You find nothing on any of the other vertebrae of that character?

A. No, I cannot say that I can see anything on any of the others.

Q. Now, he asked you to compare that particular vertebrae, that picture of 1932 and the picture you took in 1929?

A. Yes, sir.

Q. And you said you didn't have the picture of 1929?

A. I haven't one with me, but I looked up my record and it shows there that I didn't have the eleventh dorsal on my films. All other various films taken at that time showed from the second to the tenth, inclusive, and the other picture didn't get the eleventh dorsal vertebrae.

Q. Well, look at the bottom of page 4, and didn't you say this with reference to your radiograph: "Radiograph showing also the tenth, eleventh and a portion of the twelfth failed to reveal any evidence of fracture, bone dislocation or injury, either recent or old"?

A. That is true.

Q. In other words, when you were giving the answer be-
[fol. 125] fore, you were reading from the top of page 5?

A. That is right.

Q. So your findings of 1929 failed to show that he then had any spur of this kind that you mentioned on the eleventh thoracic vertebrae; isn't that true?

A. According to my record; yes, sir.

Q. Then, if you saw it in 1932 on the eleventh thoracic vertebrae, then it was from this accident?

A. Assuming all those facts to be true, yes, sir.

Q. Now, you didn't find any evidence of a bone injury or disease, anything, on the dorsal vertebrae in 1929?

A. Yes, I did. In my record that you have in your hand there, however, it doesn't show it, but the reason that it doesn't show it was because of the fact that this man was examined by me late one afternoon and, in the hurry to get the records and reports in, the X-ray films were read when they were wet, but in—(witness whispers to the Court)—those plates were read when they were wet, but on the following day, or a day or two after that when I testified in this case previously on the films that I had did show some changes in the region of his fourth dorsal that I had failed to grasp on the wet films; and we looked at them and I said they were there.

Q. But that fourth dorsal that you speak of has nothing on it, either, has it? Now, are all the tenth, eleventh and twelfth even higher?

A. Yes, it is considerably higher.

Q. But you didn't find anything in the ninth, tenth, eleventh or twelfth dorsal vertebrae in 1929?

A. No, I believe not.

Q. Doctor, I want to show you Plaintiff's Exhibits Nos. 5 and 6, particularly No. 6, which is an antero-posterior view, [fol. 126] taken by Doctor Peden in 1932, and ask you to look at those vertebrae in that picture and see whether or not you can find any evidence of any arthritic change in more than one dorsal vertebrae?

A. Yes, sir; I see some hypertrophic changes on the lower margin of the eleventh dorsal, more pronounced on the right than the left side, and on the upper margin of the tenth dorsal and on the right side there is a small hypertrophic spur.

Q. Do you see some on the lower margin of the twelfth, on the left-hand side of the lower margin?

A. No.

Q. Do you see any on the ninth, on either the left or right-hand side?

A. The ninth, on the left-hand side of the lower margin there is a very small hypertrophic spur; yes, sir.

Q. Doctor, assuming that those spurs, or bone changes, appear in the pictures taken in 1932, on the ninth, to the extent that you mention, and on the eleventh to the extent that you mention, and on the tenth, if they weren't there in 1929, they must have developed since his accident?

A. That doesn't necessarily hold true, because in here, the picture I have was taken on 9/23, that doesn't show the little spurs on the right side of the tenth as marked as Doctor Peden shows it on the picture that was taken at an earlier date; so that, if that holds true, the film that I have, which was taken later than his, should show more progress than is noted on his film, but it doesn't do it. The same thing, I might say, is true of the region of the fourth dorsal. Now, the plates that were taken by me previously and testified to by me at the previous hearing, I said there were [fol. 127] some hypertrophic changes on some part of his back, dorsal. Now, on this film, I am perfectly frank to say that I don't see that.

Q. Your pictures were taken in 1929 and 1933, and as of the tenth and twelfth reveal nothing at either time; is that right?

A. Well, as far as the one in 1933 is concerned, it shows enough evidence for me to say that there are hypertrophic changes on the eleventh and, as I said before, that Peden had a little broadening on the right-hand side of the tenth and twelfth. Naturally, his were taken before mine were taken and they are very good films.

Q. Well, if it is in 1933 and not there in 1929, it must have developed since the accident?

A. If it is not there in 1929 and is in there in 1933, it must have.

Q. It must have developed since the accident in 1927?

A. Yes; assuming all those facts to be true.

Q. You have Doctor Peden take some of your X-rays, do you not?

A. Yes, sir; Doctor Peden takes a lot of them for me.

Q. Then, most cases of arthritis—arthritis is a very painful thing, is it not?

A. Yes, it can be.

Q. And if you had a private patient, a man that came to you for treatment and you found that he didn't suffer with any pain in his back, or any other place, and had a fall, or injury, of some 10 or 12 feet and immediately began suffering pain in his spine, and immediately thereafter those spurs began to develop, you would give this injury consideration, would you not, as the cause?

A. You would have to take that into consideration; yes, sir.

Q. And injury is one of the recognized causes that aggra- [fol. 128] vate a pre-existing arthritis, is it not?

A. Yes, sir.

Q. This man co-operated with you, did he not, in making your examinations, very fully?

A. He did.

Q. Doctor, I hand you a picture taken—you interpreted the one taken a year before yours—look at this one taken a week after your picture. Your picture was taken Sep-ttember 26, 1933. Look at Doctor Peden's picture, which shows it was taken October 2, 1933, and see if there are any changes in the dorsal vertebrae?

A. I see the same arthritic changes now in the lower margin of the eleventh. I see them on the right-hand upper margin of the tenth and a small hypertrophic spur on the lower margin of the ninth, on the left-hand side.

Q. The twelfth?

A. I would not say the twelfth.

Q. So that the spur changes, when you take both of those exhibits together, No. 6 and No. 8, they show that the changes were there in 1932, in October, and again in 1933, in October, and yet they are not shown in your picture in the same place?

A. You are throwing them too fast. Now, you are getting me all mixed up. I don't quite understand you.

Q. A while ago you said that the October, 1932, pictures showed those changes on the ninth, tenth and eleventh; whereas, in your picture, in October, 1933, they only showed on the eleventh?

A. Yes, sir.

Q. You seem to indicate by that that they disappeared?

A. No, I didn't mean that they disappeared, but the centralization of the rays in taking the X-ray film may be such that a small hypertrophic spur may show up better at one point than they may at another.

[fol. 129] Q. Where you find it not showing positively and affirmatively on a clear picture, does that lose some proof of the existence of the fact or not?

A. Certainly.

Q. And with any certain inactive picture, you may take a set of pictures where it won't show it and take one that will show it, that is correct?

A. Yes, sir.

Q. Doctor, you make a great many examinations of this kind for industrial companies here in St. Louis, I believe?

A. Yes, sir.

Q. And appear frequently, when called upon to do so, in court?

A. Yes, sir.

Q. And give testimony relative to those cases?

A. Yes, sir.

Q. And, of course, you do so for a charge?

A. Yes, sir.

Mr. Eagleton: That is all.

Redirect examination.

Questions by Mr. Davis:

Q. Now, Doctor, supposing on November 20, 1927, this man fell from a box car, a height of 8 or 10 feet, and fell on his back, and when your examination was made on February 18, 1929, and you found no hypertrophic spurs on the tenth, eleventh or twelfth thoracic, or dorsal, vertebrae, and you did find in October, 1932, and September, 1933, that there were hypertrophic spurs on the eleventh vertebrae and possibly the tenth and twelfth, would you, in your opinion—what would you say with respect to the injury or fall in 1927, the effect it would have on those hypertrophic spurs around there in 1932 and 1933?

A. I don't believe that the fall caused the hypertrophic [fol. 130] spurs; what hypertrophic spurs were there, I would have to say could or might be aggravated by the fall.

Q. Supposing there weren't any there on September 12, 1929?

A. The fall didn't cause them, in my opinion.

Q. That is, if they were not there in 1929 and didn't develop until after 1929, then, in your opinion, the fall did not cause it?

A. That is my opinion; yes, sir.

Mr. Davis: That is all.

Recross-examination.

Questions by Mr. Eagleton:

Q. You were present at the time of the first trial, when Judge Davis introduced the pictures taken by Doctor Zink, showing there was an arthritis at that time?

Mr. Davis: I object to that. I object to his leading him, because that did not happen.

The Court: Well, he may say whether he did or not.

Mr. Eagleton (continuing):

Q. At the last trial of this case, in this room, you came down and listened to Doctor Zink testify, didn't you?

A. No, sir, I believe Doctor Zink testified after I did. I didn't stay to listen to his testimony.

Q. You did say that, if there was no arthritis shown in any picture within—recently after this accident occurred—within, say, a space of a couple of months that that character of arthritis as disclosed on those pictures could be aggravated by this fall?

A. I would say that it could or might.

Mr. Eagleton: That is all.

[fol. 131] Further redirect examination.

Questions by Mr. Davis:

Q. As I understand you to say that, if they were there, they could be aggravated?

A. Yes, sir.

Q. And if you didn't find them there in 1929, if they were not there in 1929, then, in your opinion, the fall of November 20, 1927, didn't cause them?

A. That is my opinion.

Mr. Davis: That is all.

Further recross-examination.

Questions by Mr. Eagleton:

Q. But, if they were there, the opposite of that is true, Doctor; if they were there in 1929, they could be aggravated, is that right?

A. Yes, sir.

The Court: Is that all tonight, gentlemen?
Mr. Eagleton: That is all.
The Court (addressing Mr. Davis): Have you any further testimony, Judge?
Mr. Davis: No, that is all.

Thereupon the defendant rested its case.

And this was all the evidence offered and introduced in the entire case.
The Court: Let me have your instructions.
Thereupon the Court duly and properly admonished the jury as to the proper conduct of its members while court should not be in session, and the court then adjourned until the 21st day of November, A. D. at the hour of ten o'clock A. M.

At which day and hour court was duly reconvened and, the jury being present as before, the following proceedings were had, to-wit:

[fol. 132] INSTRUCTIONS REFUSED

Thereupon the defendant, by its counsel, presented to the Court, in writing, and asked the Court to give to the jury an instruction in the nature of a demurrer at the close of the whole case, in the words and figures as follows, to-wit:

No. 1

"At the close of the whole case the Court instructs the jury that under the law and the evidence the plaintiff is not entitled to recover and your verdict must be for the defendant."

Which said instruction the Court, upon consideration thereof, refused to give to the jury at the request of the defendant.

To which action of the Court, in so refusing to give to the jury said instruction at the request of the defendant, the defendant by its counsel, at the time duly objected and excepted, and still continues to object and except.

Thereupon, the defendant, by its counsel, presented to the Court, in writing, and asked the Court to give to the jury an instruction in the words and figures as follows, to-wit:

Instruction No. 2

"The Court instructs the jury that plaintiff is not entitled to recover under that assignment in his petition which charges that plaintiff was working for the Wabash Railway Company as a car inspector in its yards located at or near Granite City in the State of Illinois, to determine whether or not a certain freight car was to be accepted or rejected [fol. 133] by his employer aforesaid, and that immediately prior to said time said freight car was placed upon the tracks and it was hauled and moved by defendant and tendered by defendant to the Wabash Railway Company equipped with an insecure grab-iron or handhold on the roof of said car, and that plaintiff took hold of said grab-iron and said grab-iron became detached from said car and plaintiff fell to the ground below and was injured, all of which occurred through a violation of law on the part of defendant, and particularly the laws of the United States in such case made and provided, and this assignment is withdrawn from your consideration."

Which said instruction the Court, upon consideration thereof, refused to give to the jury at the request of the defendant.

To which action of the Court, in so refusing to give to the jury said instruction at the request of the defendant, the defendant, by its counsel, at the time duly objected and excepted, and still continues to object and except.

Thereupon, the defendant, by its counsel, presented to the Court, in writing, and asked the Court to give to the jury an instruction in the words and figures as follows, to-wit:

Instruction No. 3

"The Court instructs the jury that the plaintiff is not entitled to recover under that assignment in his petition which charges that said car which plaintiff was inspecting was equipped with an insecure grab-iron or handhold on the roof of said car and that when the plaintiff took hold of [fol. 134] said grab-iron said grab-iron became detached

from said car and plaintiff fell to the ground below and was injured, in violation of defendant's rules and regulations, and rules and regulations of the American Railway Association, adopted by and which were binding upon defendant, which provided that cars, whether loaded or empty, having defects in violation of the Safety Appliance Act, should not be offered in interchange, and this assignment is withdrawn from your consideration."

Which said instruction the Court, upon consideration thereof, refused to give to the jury at the request of the defendant.

To which action of the Court, in so refusing to give to the jury said instruction at the request of the defendant, the defendant, by its counsel, at the time duly objected and excepted, and still continues to object and except.

Thereupon, the defendant, by its counsel, presented to the Court, in writing, and asked the Court to give to the jury as instruction in the words and figures as follows, to-wit:

Instruction No. 4

"The Court instructs the jury that plaintiff is not entitled to recover under that assignment in his petition which charges that defendant did further violate the law in that defendant did negligently fail to inspect or discover said insecure handhold or grab-iron prior to plaintiff's injuries aforesaid, when in the exercise of ordinary care said insecure grab-iron could or should have been discovered prior to plaintiff's injury aforesaid, and did negligently suffer and permit said grab-iron or handhold to be and remain in [fol. 135] the aforesaid insecure condition, when the defendant knew, or by the exercise of ordinary care on its part would have known of its aforesaid condition, and when defendant knew, or by the exercise of ordinary care on its part would have known that the employees of the Wabash Railway Company would be required to go upon said car and use said equipment, and that by reason thereof there was danger of injury to said employees, and this assignment is withdrawn from your consideration."

Which said instruction the Court, upon consideration thereof, refused to give to the jury at the request of the defendant.

To which action of the Court, in so refusing to give to the jury said instruction at the request of the defendant, the defendant, by its counsel, at the time duly objected and excepted, and still continues to object and except.

INSTRUCTIONS GIVEN

Thereupon, on motion of the plaintiff, the Court gave to the jury, in writing, an instruction in the words and figures as follows, to-wit:

No. 1

"The Court instructs you that if you find and believe from the evidence that on the occasion in question, the car mentioned in evidence and known as Wabash No. 76085 was in the yard of the Wabash Railway Company located at or near Granite City, Illinois, and that immediately prior to the time said freight car was placed upon the tracks there, [fol. 136] it was hauled and moved by the defendant and tendered by the defendant to the Wabash Railway Company; and if you further find that plaintiff, in the performance of his duty for the Wabash Railway Company, his employer, was required to go upon said car for the purpose of inspecting the equipment thereon and of accepting or rejecting said car on behalf of his employer, the Wabash Railway Company, if you so find; and if you further find that plaintiff, in the performance of said duty for his employer, the Wabash Railway Company, did go upon said car and while climbing thereon did take hold of the grab-iron at the top of said car mentioned in evidence and that when plaintiff took hold of said grab-iron on the roof of said car, if you so find, said grab-iron became detached from said car and by reason thereof, plaintiff was caused to fall to the ground below and was thereby injured; and if you further find that the defendant knew, or by the exercise of ordinary care on its part would have known that employees of the Wabash Railway Company would be thus required to go upon said car and use said equipment; and if you further find that at and prior to the time said car was tendered by defendant as aforesaid, said grab-iron was insecure and that the defendant did suffer and permit said grab-iron to be and remain in the aforesaid insecure condition, when the defendant knew or by the exercise of

ordinary care on its part would have known of its aforesaid insecure condition, if you so find, and that the defendant did fail to inspect or discover said grab-iron in its aforesaid insecure condition, when defendant, by the exercise of ordinary care on its part, could and would have discov- [fol. 137] ered the aforesaid insecure condition of said grab-iron prior to the time of plaintiff's injury, if you so find; and if you further find that the defendant in thus permitting said grab-iron to be and remain in the aforesaid insecure condition did then and there fail to exercise ordinary care and was guilty of negligence, and that the plaintiff while in the exercise of ordinary care for his own safety, if you so find, was injured as a direct and proximate result of the aforesaid negligence on the part of defendant (if you find defendant was guilty of negligence in thus permitting said grab-iron to be and remain in the aforesaid insecure condition) then your verdict must be in favor of the plaintiff and against the defendant."

To which action of the Court, in so giving to the jury said instruction at the request of the plaintiff, the defendant, by its counsel, at the time duly objected and excepted, and still continues to object and except.

Thereupon, on motion of the defendant, the Court gave to the jury, in writing, an instruction in the words and figures as follows, to-wit:

No. 2

"The Court instructs you that, in determining whether or not the defendant in this case, on the occasion when plaintiff is alleged to have been injured, was guilty of a violation of some duty toward plaintiff as defined in these instructions and in determining whether or not plaintiff was injured and the extent of his injuries, if any, you are not at liberty to resort to guess, speculation or conjecture, but must be [fol. 138] governed by the evidence and the instructions of the Court, and if, under such evidence and instructions, you are unable to determine with reasonable certainty the issues of whether or not the defendant on said occasion was guilty of a violation of a duty to plaintiff or whether or not plaintiff suffered injury and the extent of his injuries, if any, then as to such issues you must find for defendant."

To which action of the Court, in so giving to the jury said instruction at the request of the defendant, the plaintiff,

by his counsel, at the time duly objected and excepted, and still continues to object and except.

Thereupon, on motion of the defendant, the Court gave to the jury, in writing, an instruction in the words and figures as follows, to-wit:

No. 3

"The Court instructs you that the fact that plaintiff was injured is, in itself, no evidence of a violation of any duty that defendant owed to plaintiff, but on the contrary plaintiff must by his evidence, and all the facts and circumstances introduced in evidence, show by the preponderance or greater weight of the evidence that defendant violated a duty it owed to plaintiff before plaintiff may recover."

To which action of the Court, in so giving to the jury said instruction at the request of the defendant, the plaintiff, by his counsel, at the time duly objected and excepted, and still continues to object and except.

Thereupon, the Court at the request of plaintiff, gave to [fol. 139] the jury, in writing, an instruction in the words and figures as follows, to-wit:

No. 4

"The Court instructs you that if under the evidence and the other instructions of the Court, you find in favor of the plaintiff, then in assessing his damages you will allow him such sum as will fairly and reasonably compensate him for whatever injuries, if any, plaintiff suffered on the occasion in question, and such, if any, as directly resulted therefrom, and in arriving at your verdict you may take into consideration the permanency, if any, of said injuries, and the pain of body and mind, if any, which you find directly resulted therefrom, or is reasonably certain to be suffered by the plaintiff in the future as a direct result thereof; and for whatever loss of earnings, if any, that you find from the evidence plaintiff has suffered as a direct result of said injuries, if any; and for such future loss of earnings, if any, plaintiff is reasonably certain to suffer in the future by reason of his injuries in question, if any. And you may further take into consideration such reasonable medical bills, if any, you find from the evidence plaintiff has incurred and become liable for in the treatment of

the aforesaid injuries, if any, not however, to exceed the sum of $520.00 for such reasonable medical bills, if any."

To which action of the Court, in so giving to the jury said instruction, at request of plaintiff, the defendant, by its counsel, at the time duly objected and excepted, and still continues to object and except.

[fol. 140] Thereupon, of its own motion, the Court gave to the jury, in writing, an instruction in the words and figures as follows, to-wit:

No. 5

"The Court instructs you that nine of your number have the power to find and return a verdict, and if less than the whole of your number, but as many as nine, agree upon a verdict, the same should be returned as the verdict of the jury, in which event all of the jurors who concur shall sign the same.

"If, however, you all concur in a verdict, your foreman alone may sign it."

To which action of the Court, in so giving to the jury said instruction, of its own motion, the defendant, by its counsel, at the time duly objected and excepted, and still continues to object and except.

Thereupon, upon the said 21st day of November, A. D. 1933, the jury having heard the evidence and the arguments of counsel, and being advised of the law by the instructions of the Court, retired to the jury room to consider of their verdict in said cause.

And thereafter, on the said same 21st day of November, A. D. 1933, the jury returned into said court, in writing, their verdict in favor of the plaintiff and against the defendant in the sum of Fifteen Thousand Dollars, which verdict was in words and figures as follows, to-wit:

[fol. 141] In Circuit Court, City of St. Louis

[Title omitted]

Verdict and Judgment

We, the jury in the above cause, find in favor of the plaintiff on the issues herein joined and assess plaintiff's damages at the sum of Fifteen Thousand Dollars.

(Signed) D. C. Cunningham, Foreman.

Which said verdict the Court received from said jury, and the same was on the said same 21st day of November, A. D. 1933, filed in said court in said cause; and on said same 21st day of November, A. D. 1933, the Court duly entered of record, in accordance with said verdict, its judgment against the defendant and in favor of the plaintiff in the sum of Fifteen Thousand Dollars.

To which action of the Court, in so receiving and filing the said verdict, and to the rendering of said judgment thereon, the defendant, by its counsel, at the time duly objected and excepted, and still continues to object and except.

And thereafter, at the said September Term, A. D. 1933, of said court, and within four days after the rendition of [fol. 142] said verdict, and on, to-wit, the 22nd day of November, A. D. 1933, the defendant duly filed in said court in said cause, in writing, its motion for a new trial in the words and figures as follows, to-wit:

IN CIRCUIT COURT, CITY OF ST. LOUIS

[Title omitted]

DEFENDANT'S MOTION FOR A NEW TRIAL

Comes now the defendant in the above entitled cause and moves the Court to set aside the verdict of the jury rendered herein on November 21st, 1933, and to grant it a new trial for the following reasons:

1. Because the verdict is against the law.

2. Because the verdict is against the evidence.

3. Because the verdict is against the law, the evidence and the law under the evidence.

4. Because the verdict is against the weight of the evidence.

5. Because the Court erred, over defendant's objections and exceptions, in refusing to give and read to the jury an instruction, in the nature of a demurrer to the evidence, [fol. 143] to find for defendant, offered by defendant at the close of plaintiff's case.

6. Because the Court erred, over the defendant's objections and exceptions, in refusing to give and read to the jury an instruction, in the nature of a demurrer to the evidence, to find for defendant, offered by the defendant at the close of the whole case.

7. Because the Court erred, over defendant's objections and exceptions, in refusing to give and read to the jury each and every instruction offered by defendant and refused by the Court.

8. Because the Court erred, over defendant's objections and exceptions in giving and reading to the jury each and every instruction offered by plaintiff and given by the Court.

9. Because the Court erred, over defendant's objections and exceptions, in permitting the plaintiff to introduce in evidence illegal, incompetent, irrelevant, immaterial and prejudicial testimony and evidence.

10. Because the Court erred, over defendant's objections and exceptions, at the request of defendant in refusing to strike out and from the record, and to permit to remain in evidence illegal, incompetent, irrelevant, immaterial and prejudicial testimony and evidence submitted on behalf of plaintiff.

11. Because the Court erred, over defendant's objections and exceptions, in refusing to permit the defendant to introduce legal, competent, proper, relevant and material testimony.

12. Because the Court erred, over defendant's objections [fol. 144] and exceptions, in refusing to sustain defendant's written motion to strike out portions of plaintiff's third amended petition, and in overruling same.

13. Because the Court erred, over defendant's objections and exceptions, in refusing to sustain defendant's written motion to require plaintiff to elect between causes of action stated in plaintiff's third amended petition and in overruling same.

14. Because the verdict is the result of passion and prejudice on the part of the jury.

15. Because the Court erred, over defendant's objections and exceptions, in giving and reading to the jury erroneous, misleading and improper instructions on behalf of plaintiff.

16. Because the Court erred, over defendant's objections and exceptions, in refusing to give and read to the jury legal and proper instructions in writing requested by defendant.

Respectfully submitted, (Signed) T. M. Pierce, J. L. Howell, Walter N. Davis. (Signed with pen) Walter N. Davis, Attorneys for Defendant.

And thereafter, at the December Term, A. D. 1933, of said court, and on, to-wit, December 26, 1933, the said court, upon consideration of said motion for a new trial, overruled the same.

To which action of the Court, in so overruling said motion for a new trial, defendant, by its counsel, at the time duly [fol. 145] objected and excepted, and still continues to object and except.

And thereafter, at the said December Term, A. D. 1933, of said court, and on the 8th day of January, A. D. 1934, said defendant duly filed in said court, in said cause, in writing, its affidavit for appeal in the words and figures as follows, to-wit:

IN CIRCUIT COURT, CITY OF ST. LOUIS

[Title omitted]

AFFIDAVIT FOR APPEAL

Walter N. Davis, of lawful age, being first duly sworn, upon his oath states that he is attorney and agent for the above-named defendant, Terminal Railroad Association of St. Louis, a corporation, and as such is authorized and does make this affidavit for and in behalf of said defendant and says that the appeal prayed for in the above entitled cause is not made for vexation or delay, but because the affiant [fol. 146] believes that the appellant is aggrieved by the judgment or decision of the Court.

(Signed) Walter N. Davis.

Subscribed and sworn to before me this 2nd day of January, A. D. 1934. (Signed) May E. Benson, Notary Public, City of St. Louis, Mo. My commission expires June 29, 1935. (Seal.)

And on the said same 8th day of January, A. D. 1934, at said December Term, A. D. 1933, of said court, said court duly allowed said defendant an appeal in said cause to the Supreme Court of Missouri.

And on the said same 8th day of January, A. D. 1934, said defendant duly filed in said court, in writing, its appeal bond in the words and figures as follows, to-wit:

(Clerk here insert appeal bond.)

ORDER SETTLING BILL OF EXCEPTIONS

And now, in order that the above matters and things, evidence, motions, documents, objections, rulings, exceptions, verdict, judgment, affidavit for appeal, and appeal bond may be and become a part of the record in this cause and subject to review by the Supreme Court of Missouri, the defendant here now presents to said Court this, his bill of exceptions in said cause, and prays said Court to sign, seal and approve the same as a true and correct bill of excep-
[fols. 147-150] tions in said cause, which is accordingly done on this 12th day of June, A. D. 1935.

O'Neill Ryan, Judge of Division No. 4 of the Circuit Court of the City of St. Louis, Missouri.

Approved: Mark D. Eagleton, Attorney for Plaintiff.
Approved: Walter N. Davis, Attorney for Defendant.
January 24, 1935.

And thereafter and on the 10th day of January, 1936, the following proceedings were had and entered of record in said cause, to-wit:

No. 33525

THOMAS J. BRADY, Resp.,

vs.

TERMINAL RAILROAD ASSN., App.

Come now the parties, by their respective attorneys, and after arguments herein submit this cause to the Court.

And thereafter and on the 23rd day of April, 1936, the following further proceedings were had and entered of record in said cause, to-wit:

THOMAS J. BRADY, Respondent,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation, Appellant

Appeal from the Circuit Court of St. Louis City

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of St. Louis City rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgment; and that the said appellant recover against the said respondent its costs and charges herein expended, and have execution therefor. (Opinion filed.)

NOTE.—The opinion appears on page 174 of this transcript.

And thereafter and on the 4th day of May, 1936, the following further proceedings were had and entered of record in said cause, to-wit:

No. 33525

THOMAS J. BRADY, Resp.;

vs.

TERMINAL RAILROAD ASSN., App.

Comes now the respondent, by attorney, and files herein a motion for rehearing and suggestions in support and a motion to transfer to Court en Banc.

Which said motions for a rehearing and to transfer to Court en Banc are in words and figures following, to-wit:

[fol. 153] IN SUPREME COURT OF MISSOURI, DIVISION NO. 1

[Title omitted]

RESPONDENT'S MOTION TO TRANSFER TO THE COURT EN BANC

Comes now Thomas J. Brady, respondent in the above-entitled cause, and moves the Court to transfer this case to the Court en banc for the following reasons:

I

The appeal herein involves the construction of the Federal Safety Appliance Act (45 U. S. C. A., Sec. 1 et seq.) with respect to the liability of the appellant for injuries sustained by a car inspector resulting from a defective safety appliance upon a car tendered for transfer to his [fol. 153-1] employer by the defendant, the said car inspector, his employer, and defendant being engaged in interstate commerce and transportation. The question is a novel and important one.

II

The appeal herein involves the construction of the Federal Safety Appliance Act (45 U. S. C. A., Sec. 1 et seq.) with respect to its application to cars placed upon a transfer track and tendered by one connecting interstate carrier to another. This question, also, is a novel and important one.

III

The appeal herein, involving as it does the application and construction of the Federal Safety Appliance Act (45 U. S. C. A., Sec. 1 et seq.), involves a federal question within the meaning of Article VI, Section 4 of the Constitution of the State of Missouri, which provides for a transfer of such causes to the court en banc for its decision.

IV

The opinion and decision of Division No. 1 in the instant case is in conflict with the controlling decisions of the

Supreme Court of the United States and the United States Courts of Appeals, in the following cases:

Delk v. St. Louis & S. F. R. Co., 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590;

Chicago G. W. R. Co. v. Schendel, 267 U. S. 287, 45 Sup. Ct. 303, 69 L. Ed. 614;

[fol. 153-2] Erie R. Co. v. Russell, 106 C. C. A. 160, 183 Fed. 722 (writ of error dismissed, 220 U. S. 607, 31 Sup. Ct. 722, 55 L. Ed. 607);

United States v. St. Louis S. W. R. Co., 106 C. C. A. 230, 184 Fed. 28,

and those federal courts, in the cases just cited, have interpreted and applied the Safety Appliance Act consistent with respondent's theory in this case.

Wherefore, respondent prays the Court to transfer this case to the Court en banc.

Eagleton, Waechter, Yost, Elam & Clark, Attorneys for Respondent.

[fol. 153-3] In Supreme Court of Missouri, Division No. 1

[Title omitted]

Motion of Respondent for a Rehearing

Comes now Thomas J. Brady, respondent in the above entitled cause, and moves the Court to set aside its opinion, decision and judgment rendered herein on the 23rd day of April, 1936, and to grant respondent a rehearing herein for the following reasons:

I

The opinion, decision and judgment of the Court, in ruling, substantially, that the car upon which plaintiff was working at the time of his injury was not "in use on the defendant's line" within the true purpose and scope of the Safety Ap- [fol. 153-4] pliance Act, and had been temporarily withdrawn from use at the time of plaintiff's injury, is in direct conflict with the following controlling decisions of the Supreme Court of the United States:

Chicago G. W. R. Co. v. Schendel, 267 U. S. 287, 45 Sup. Ct. 303, 69 L. Ed. 614;

Delk v. St. Louis & S. F. R. Co., 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590,

and the following decisions of other federal courts:

Erie R. Co. v. Russell, 106 C. C. A. 160, 183 Fed. 722 (writ of error dismissed, 220 U. S. 607, 31 Sup. Ct. 722, 55 L. Ed. 607);

United States v. St. L. S. W. R. Co., 106 C. C. A. 230, 184 Fed. 28.

II

The opinion, decision and judgment of the Court misconstrues Baltimore & Ohio R. Co. v. Hooven, 297 Fed. 919; McCalmont v. Pennsylvania R. Co., 283 Fed. 736; Sherry v. Baltimore & Ohio R. Co., 30 Fed. (2d) 487, and kindred cases, which this Court deems controlling, in that in such cases the cars in question were actually "withdrawn from use and service," having been placed upon repair tracks for the purpose of being repaired prior to the injury.

III

The opinion, decision and judgment of the Court overlooked the following points, to wit:

(a) The car upon which plaintiff was injured, together with other cars, had been placed by the defendant upon the [fol. 153-5] transfer track for the primary purpose of tendering those cars to the Wabash for further transportation, and the inspection thereof by the Wabash was but an incident to such tender. These cars were, accordingly, not "withdrawn from service and use" by the defendant, but were in actual use by the defendant for the purpose of making such tender.

(b) In the trial of this cause in the court below, and in this court, it was assumed by both parties that the car in question was "in use" by the defendant, the defendant at no time intending that such car was not "in use" by it—the fact being that defendant in this court actually contended that the case was governed by the Federal Safety Appliance Act (Appellant's Brief, p. 19).

(c) In Brady v. Wabash R. Co. (Mo. Sup.), 49 S. W. (2d) 24, this Court ruled only that the defective car in question was not being "hauled or used" by the defendant there, the Wabash Railroad Company, and did not hold generally "that the car was not being hauled at the time of plaintiff's injury, but that its movement had ended some four hours

before when the cars were placed upon the exchange track of the Wabash by defendant," as stated at page 3 of the opinion in the instant case.

IV

The opinion and decision of this Court, in considering at all the point that the car upon which plaintiff was injured was not being "hauled or used" by the defendant at the time of plaintiff's injury, when defendant-appellant nowhere urged such point, is erroneous and is in conflict with [fol. 153-6] the prior controlling decisions of this Court in the following cases:

Gottschalk v. Wells (Mo. Sup., Div. 1), 274 S. W. 399;
Compton v. Louis Rich Const. Co., 315 Mo. 1068, 287 S. W. 474;
Dickson v. Maddox (Mo. Sup., Div. 2), 48 S. W. (2d) 873;
Mercantile Trust Co. v. Dulle (Mo. Sup., en Banc), 282 S. W. 414.

V

The opinion, decision and judgment of the Court, in holding, substantially, that the car upon which plaintiff was working at the time of his injury, and the forty or fifty other cars in that same drag, were temporarily withdrawn from use "for inspection and to be further kept out of use if its condition so required," overlooks the basic and elementary fact that the placing of these cars upon the transfer track was for the purpose of tendering them to the Wabash, for transfer, so that their movement and carriage could be continued, and the inspection was a mere incident to such transfer—"the Wabash could or not inspect it, as it saw fit," as the appellant so aptly puts it in its brief at page 33.

Eagleton, Waechter, Yost, Elam & Clark, Attorneys for Respondent.

[fol. 153-7] Suggestions in Support of Motion for Rehearing

The controlling point in the opinion and decision of this Court in the instant case, in so far as the application of the Federal Safety Appliance Act is concerned, is the ruling of this Court that at the time of plaintiff's injury the car

upon which plaintiff was working was not being "hauled or used" by the defendant within the meaning of the Safety Appliance Act, but that, instead, such car had been temporarily "withdrawn from use." We respectfully submit that in so holding the opinion and decision of this Court, and the judgment of this Court entered thereon, is erroneous.

And, we respectfully submit, in so holding the opinion and decision of this Court is in conflict with the controlling decisions of the United States Supreme Court and other federal courts.

In considering this proposition, it should be recalled that the evidence in this case distinctly showed that this car, together with some forty or fifty other cars, had been moved interstate by the defendant and placed upon the transfer track in question for the purpose of tendering all of said cars to the Wabash Railway Company for further transportation. The car in question, and the forty or fifty other cars in the train, had not been placed upon the transfer track for the purpose of repair. The inspection, which was being made by the Wabash, through the plaintiff, was but an incident to the tender of such cars by the defendant, and while such inspection was being made "the train of cars was in the possession of the defendant, for they had not as [fol. 153-8] yet been delivered to the Wabash * * *" (Appellant's Brief, p. 24).

Although the "hauling of the car in question," if "hauling" is to be limited to its actual movement, had been completed by defendant some three hours previous to plaintiff's injury, at the time the car in question was placed upon the transfer track, we fail utterly to see how it can be ruled that the car's "use" by the defendant had terminated. These cars, including the one upon which plaintiff was working at the time of his injury, had not been placed upon the transfer track for repairs, and had not been "withdrawn from service or use," because they were then and there being in service, and used, for the purpose of effectuating their transfer from the defendant to the Wabash, in order that their transportation might be continued. This Court held, in Brady v. Wabash R. Co. (Mo. Sup.), 49 S. W. (2d) 24, that these cars were not in use by the Wabash, it not having accepted them, and the fact is that the cars

were still in the possession of the defendant-appellant, as even the appellant contends (Appellant's Brief, p. 24).

Of a certainty, the mere placing of these cars, including the one upon which plaintiff was working at the time he was injured, upon the transfer track did not have the effect of withdrawing them from service and use.

We believe that the case of Delk v. St. Louis & S. F. R. Co., 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590, is controlling here. In that case, a car containing an interstate shipment was found by the defendant to be defective and was placed upon a switch track, known as "the dead track," to await repairs. In undertaking to move other cars off of [fol. 153-9] this switch track, it became necessary to move the defective car, and while attempting to do so, the plaintiff was injured as the result of a defective safety appliance. The defendant there claimed that the defective car in question, having been upon the repair track awaiting repair for some twenty-seven or twenty-eight hours previous to plaintiff's injury, was not "in use" in interstate commerce by the defendant, but had been withdrawn from service. The Supreme Court of the United States, adopting the language of the Circuit Court of Appeals on a previous hearing, with reference to such contention said (220 U. S. 584 et seq.):

"* * * We are inclined to think otherwise. Its cargo had not yet reached its destination and was not then ready for the delivery to the consignee wherewith the commerce would have ended. Its stoppage in the yard was an incident to the transportation. * * * After the coupler became defective and could not be coupled without going between the ends of the cars, it became unlawful for the railroad company to haul it, or permit it to be hauled, or used, on its line. It then became the duty of the railroad company to withdraw the car from use, and have it repaired to conform with the law before using it further. It did not do this. * * * The car was defective, liable at any time to cause an accident, and it could not be kept in use at the constant risk of a serious accident, either upon the excuse that it would be inconvenient to withdraw it from service, or that the company had sent for the required appliance, and would repair the car when it should be received. This is a case peculiarly within the provisions of the (safety appliance) act." (Parenthetical portion ours.)

[fol. 153-10] In the later case of Chicago, G. W. R. Co. v. Schendel, 267 U. S. 287, 45 Sup. Ct. 303, 69 L. Ed. 614, the facts were that a drawbar had pulled out of a car, and the car was thereupon chained to the car immediately ahead. These cars were then pulled onto an adjacent siding, with the intention of detaching the damaged car and leaving it there to be repaired. After the defective car had been placed upon the siding, and the engine cut off it, the car ran slowly down the gentle grade of the siding, and the chain on the car caught plaintiff's decedent, causing him to suffer fatal injuries. It was contended by the defendant that the case was not brought within the Safety Appliance Act by the facts, in that the defective car had come to rest on the sidetrack and had ceased to be "used" within the meaning of the statute, at the time plaintiff's decedent was injured. The Supreme Court of the United States, in ruling adversely to such contention, distinctly said (267 U. S., l. c. 291):

"Under the circumstances disclosed, we think it clear that the use, movement or hauling of the defective car, within the meaning of the statute, had not ended at the time of the accident."

We believe that these two authorities make it clear that, not only had the "use" of the car in the instant case by the defendant not been terminated by its being placed upon the transfer track, but its "hauling" by the defendant had not been ended. The car had not been "hauled or used" by the Wabash, although it was defendant's intention that it should be so "hauled and used," and at the time defendant placed such car upon the transfer track, it was not defend-
[fol. 153-11] ant's intention or purpose to remove the car from service or use.

In addition to the decisions of the United States Supreme Court, just above cited and quoted from, there are other federal decisions which conclusively demonstrate that the defective car in the instant case was not "withdrawn from service or use" at the time of plaintiff's injury. In Erie R. Co. v. Russell, 106 C. C. A. 160, 183 Fed. 722 (writ of error dismissed 220 U. S. 607, 31 Sup. Ct. 722, 55 L. Ed. 607), the defective car in a train was left standing on a switch in a freight yard with the intention to repair it and, after repairing it, to couple the train containing this car

to other cars which had previously been left upon the switch. While the switching crew was looking for a knuckle with which to repair the defective car the plaintiff's intestate found one, went in between the cars and attempted to adjust the coupling apparatus, but was unable to do so. Thereupon, one of the other men went to look for another pin, and while plaintiff's intestate was holding the knuckle in place other cars moved on the switch track and crushed plaintiff's intestate in between them and the car upon which he was working. The defective car, after being repaired, was taken the following day on the easterly trip of a local freight train. The Second Circuit Court of Appeals said (183 Fed., l. c. 524):

"The first question in the case is whether the act of the defendant constituted a violation of the federal safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], as amended March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1909, p. 1143]), the relevant sections of which are printed in the footnote.
[fol. 153-12] "The first phase of this question is whether the car with the defective coupler was, at the time of the accident, in use within the meaning of the amended act. It is pointed out that the car was not being hauled at the time of the accident, but was standing upon a switch track for the insertion of the knuckle in the coupling apparatus, and it is contended that it was not then being used within the contemplation of the statute. We think upon the authority of Johnson v. Southern Pacific Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, that this contention is not well founded. *The car with the defective coupler was not withdrawn from use. Although billed to the repair shop it was not sent there, nor was it sent to any place used especially for making repairs.* The insertion of the knuckle was a simple matter. The car was stopped only temporarily, and it was intended to couple it to the other cars as soon as repaired *These facts seem clearly to distinguish this case from the cases cited in the defendant's brief where accidents occurred when cars had been sent to repair shops or placed upon dead tracks used for repair purposes.*"

We believe that the foregoing authorities conclusively demonstrate the error inhering in the opinion in the instant case. As we have heretofore suggested, the mere

placing of forty or fifty cars (including the one upon which plaintiff was working when he was injured) by the defendant upon the transfer track would not have the effect of withdrawing those cars from service or use. The purpose and intention of the defendant in so placing the cars—which purpose and intention was to effectuate a transfer of the cars to the Wabash so that they might continue upon their journey and transportation, is a vital and material [fol. 153-13] factor in the determination of whether the cars were then in use by the defendant. Furthermore, in that determination, the purpose and intent of the passage of the Safety Appliance Act should also be considered, and its clearly defined purpose "to promote the safety of employes and travelers upon railroads" "*should not be frittered away by judicial construction.*" (United States v. Chicago M. & St. P. R. R. Co., 149 Fed. 486, syllabus 2). As was so aptly said by the United States Supreme Court in Johnson v. Southern Pacific R. Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, in construing and applying the Safety Appliance Act it should not be forgotten that:

"The primary object of the act was to promote the public welfare by securing the safety of employees and travelers, and it was in that aspect remedial, while for violations a penalty of $100.00, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominate than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue and for the collection of customs, that rule not requiring absolute strictness of construction" (citing cases).

"Moreover, it is well settled that 'though penal laws are to be construed strictly, yet the intention of the Legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the Legislature.' United States v. Lacher, 134 U. S. 624. In that case we cited and quoted from United States v. Winn, 3 Sumn. 209, in which Mr. Justice Story, referring to the rule that penal statutes are to be construed strictly, said:

[fol. 153-14] "'I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged

by implication, or extended to cases not obviously within their words and purport. *But where the words are general, and include various classes of persons, I know of no authority, which would justify the Court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statutes is equally applicable to all of them. And where a word is used in a statute, which has various known significations, I know of no rule that requires the Court to adopt one in preference to another, simply because it is more restrained, if the objects of the statutes equally apply to the largest and broadest sense of the word.* In short, it appears to me, that the proper course in all these cases, is *to search out and follow the true intent of the Legislature, and to adopt that sense of the word which harmonizes best with the context, and promotes in the fullest manner, the apparent policy and object of the Legislature.'* ''

It is obvious that the opinion in the instant case has "frittered away by judicial construction" the humanitarian purpose of the Safety Appliance Act, contrary to the admonition of the Court in United States v. Chicago, M. & St. P. R. Co., 149 Fed. 486, supra, and has adopted an interpretation of the words "hauled and used" that is exceptionally restrained and narrow and does not harmonize with the context, or promote in the fullest manner the apparent policy and object, of the Safety Appliance Act.

Under the construction and application of the Safety Appliance Act as announced by this Court in its opin- [fol. 153-15] ion in the instant case, any railroad employee who might have been injured as the result of a defective safety appliance while working on or about this entire cut or drag of forty or fifty cars (of which the car upon which plaintiff was working at the time of his injury was one) would not be entitled to recover under the provisions of the Federal Safety Appliance Act because, if the car upon which plaintiff was working was "withdrawn from service and use," so were the other forty or fifty cars in that "drag." Neither logic, reason, nor a fair interpretation of the Safety Appliance Act, supports the construction placed upon, and application of the facts to, the Safety Appliance Act as ruled in this Court's opinion in the instant case.

II

What we have heretofore said is not in the least in conflict with the decisions in Baltimore & Ohio R. Co. v. Hooven, 297 Fed. 919; McCalmont v. Pennsylvania R. Co., 283 Fed. 736; Sherry v. B. & O. R. Co., 30 Fed. (2d) 487, which this Court evidently considers binding upon it and holding otherwise. In each of the cases last cited, the accidents occurred after cars had been sent to repair shops or placed upon dead tracks used for repair purposes. This distinction was clearly made in Erie R. Co. v. Russell, 106 C. C. A. 160, 183 Fed. 722 (writ of error dismissed, 220 U. S. 607, 31 Sup. Ct. 722, 55 L. Ed. 607), which we have heretofore discussed, and the distinction is manifest because, in the instant case, the transfer track upon which the cars here involved were placed was not a "dead track," and was not used for repair [fol. 153-16] purposes, and the cars here in question were not placed upon the transfer track for "repair purposes," but were placed there solely for the purpose of effectuating a transfer to the Wabash so that the transportation of the cars could continue, the inspection by the Wabash being merely incidental to such transfer.

This distinction makes it manifest, we submit, that the opinion and decision of this Court in the instant case misconstrues Baltimore & Ohio R. Co. v. Hooven, supra; McCalmont v. Pennsylvania R. Co., supra, and Sherry v. Baltimore & O. R. Co., supra.

III

We will not here undertake to enlarge upon points III and V of respondent's motion for a rehearing. We do, however, feel that point IV of that motion should be enlarged upon somewhat.

It is an elementary axiom of the law that the judgments of trial courts are presumed to be correct until otherwise shown, and that appellate courts will not search through a record to find a point for the reversal of such judgments, it being the duty and burden of the appellant to first point out the error and establish that it was prejudiced thereby. Notwithstanding that axiom, and notwithstanding the further fact that the appellant in the instant case at no time in either the trial court or this court raised the issue that the car in question was not being "hauled or used" by it at the time of plaintiff's injury, and notwithstanding the fact that

both plaintiff and defendant tacitly assumed at all times that the car was being "hauled or used" by the defendant at such time within the provisions of the Safety Appliance Act, this Court has, nevertheless, of its own volition, raised this [fol. 153-17] issue in order to overthrow the presumption of the regularity of the judgment in the trial court. As a result, the opinion and decision of the Court in the instant case is in direct conflict with the prior controlling opinion of this Court in Gottschalk v. Wells, 274 S. W. 399, 400, wherein it was said:

"It is useless to cite cases to the effect that, where an appellant fails to urge a point either by way of assignment of error or by his points and authorities (tantamount in language to accomplish the same purposes), he is deemed to have abandoned such point, and *it will not be considered here.* All of our cases so run."

To this same effect are the other decisions of this Court, both en banc and in division, cited under point IV of respondent's motion for a rehearing.

Conclusion

For the reasons, and upon the authorities, heretofore referred to, it is manifest that the divisional opinion of this Court in the instant case is erroneous, is in conflict with the prior controlling decisions of this Court, and is in conflict with the prior controlling decisions of the Supreme Court of the United States and other federal courts. Accordingly, we most respectfully submit that respondent's motion for a rehearing should be sustained.

Respectfully submitted, Eagleton, Waechter, Yost, Elam & Clark, Attorneys for Respondent.

And thereafter and on the 12th day of November, 1936, the following further proceedings were had and entered of record in said cause, to-wit:

No. 33525

THOMAS J. BRADY, Resp.,

vs.

TERMINAL RAILROAD ASSN., App.

Now at this day, the Court having seen and fully considered respondent's motion for a rehearing, doth order that said motion be, and the same is hereby overruled. And now the Court having seen and fully considered respondent's motion to transfer to Court en Banc, doth order that said motion be, and the same is hereby sustained.

And thereafter and on the 29th day of January, 1937, the following further proceedings were had and entered of record in said cause, to-wit:

No. 33525

THOMAS J. BRADY, Resp.,

vs.

TERMINAL RAILROAD ASSN., App.

Come now the parties, by their respective attorneys, and after arguments herein submit this cause to the Court.

And thereafter and on the 19th day of February, 1937, the following further proceedings were had and entered of record in said cause, to-wit:

THOMAS J. BRADY, Respondent,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation, Appellant

Appeal from the Circuit Court of St. Louis City

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now

sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of St. Louis City rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgment; and that the said appellant recover against the said respondent its costs and charges herein expended, and have execution therefor. (Opinion filed.)

Which said opinion is in words and figures following, to-wit:

IN THE SUPREME COURT OF MISSOURI, COURT EN BANC, SEPTEMBER TERM, 1935

No. 33,525

THOMAS J. BRADY, Respondent,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation, Appellant

The appellant, Terminal Railroad Association of St. Louis, hereinafter called the Terminal, seeks the reversal of the judgment below for $15,000, the amount assessed against it by the verdict of the jury as compensation to the respondent, plaintiff below, for personal injuries sustained by him through the alleged want of due care on the part of the Terminal with respect to a certain box car on which the plaintiff received the injuries while inspecting it for his employer, the Wabash Railway Company (which will be referred to as the Wabash), upon whose inbound or receiving track the car had been placed for that purpose by the Terminal. Both railroad companies are common carriers engaged in interstate commerce and have a connection at Granite City, Illinois.

The plaintiff, in making the inspection, stood upon one of the side ladders of the car and with the aid of his flashlight looked at the grabiron on top and near the edge of the car and then tested that appliance by pulling on it. When next he placed his weight upon it an attempt to pull

himself up on top of the car, the grabiron and the board to which it was attached came loose, causing him to fall with them to the ground, where upon examining the board he found it had become rotten from end to end on the under side, and to some extent on the upper side around the bolts by which the grabiron was attached to it.

The plaintiff first brought suit to recover against his employer, the Wabash, for his injuries, predicating his action upon the Federal Safety Appliance Act alone (45 U. S. C. A. Secs. 1 et seq.). Within a few months thereafter, and before that case went to trial, he brought the present suit against the Terminal, basing the same both upon said Act and alleged common law liability. The former case was ultimately determined adversely to him by this court (Brady v. Wabash R. Co. 329 Mo. 1123, 49 S. W. (2d) 24, 83 A. L. R. 655). Additional facts may be found there and need not be stated here. Also, since principles of law announced there are largely determinative of the claim of liability as based upon said statute and the same injury, we will omit plaintiff's citations on the first branch of this case, as they are much the same as those cited in the former case. However, we have re-examined them preparatory to this writing.

Plaintiff's petition on which the case was tried charged, and plaintiff's instruction to the jury predicated a recovery upon a finding, in the conjunctive, that plaintiff's injuries were the proximate result of: (1) A violation by defendant of the Federal Safety Appliance Act; (2) defendant's negligent failure to inspect or discover the insecure grabiron or handhold on the car in question when, by the exercise of ordinary care on defendant's part, the same would have been discovered; and (3) defendant's negligence in suffering and permitting the grabiron or handhold to be and remain in an insecure condition, with actual or constructive knowledge thereof and with knowledge that the employees of the Wabash company would be required to go upon the car and use the handhold.

As respondent concisely states, the appellate issues, although contained in numerous points and authorities, are basically: (1) Whether plaintiff made a submissible case for the jury under the provision of the Safety Appliance Act; (2) whether, if plaintiff failed to make a submissible case under that Act, he made a submissible case under com-

man law negligence theories; and subsidiary points, to be stated later if necessary.

I. With respect to the application of the Safety Appliance Act to the situation presented here the primary question for decision is, as it was in the former case, whether the car in question was at the time of plaintiff's injury within the terms of the statutory prohibition as to hauling or using or permitting the hauling or use of, cars on their lines by common carriers engaged in interstate commerce. We there pointed out that the statute was intended to prohibit such a common carrier "to haul or permit to be hauled or used on its line" any car with an insecure handhold, as was unquestionably the condition of this Wabash car No. 76085. We held that the car was not being hauled at the time of plaintiff's injury but that its movement had ended some four hours before when the cars were placed on the exchange track of the Wabash by defendant, as licensee, and tendered to the Wabash as receiving carrier; whose non-delegable duty it became under the Act to inspect for itself and ascertain at its peril, before accepting the tendered cars for shipment on its lines or handling them in any way—except perhaps to make necessary repairs,—that such cars were equipped in every way and complied in every respect with the requirements of the Safety Appliance Act; that the receiving carrier could not rely on the employees of defendant (the delivering carrier) not to deliver to it dangerously defective cars * * * but it was also the duty of the receiving carrier to reject and not to receive or handle cars so tendered by other carriers which are found on such inspection not equipped with safety appliances as required by said Act. [Citing Kurtz v. Detroit, Toledo & I. R. Co. 238 Mich. 289, 213 N. W. 169, 171; United States v. Northern Pacific R. Co. (C. C. A.) 287 F. 780, 784; B. & O. S. W. R. Co. v. United States (C. C. A.) 240 F. 420 and other authorities.]

In this connection we may add that a railroad company does not perform its duty to inspect handholds on freight cars for the safety of employees, by having its inspectors merely pass by and look at them, but the handholds must be subjected to a test similar to that they will receive in use. [B. & O. R. Co. v. Smith, 169 Ky. 593, 184 S. W. 1108; Aff'd in 246 U. S. 653, 62 L. Ed. 922; Fulton v. Bullard, 37 C. C. A. 1, 94 Fed. 781; L. R. A. 1918 F. 1205.]

We determined in plaintiff's former case supra, as the crucial point therein as it is herein, that the Wabash was not "using" the defective car "on its line" at the time and place of plaintiff's injury; that is, not using it in the legal sense of the term as it has been construed by the federal cases which we there cited and reviewed, viz., U. S. v. St. Louis S. W. R. Co. (C. C. A.) 184 F. 28, 32; Erie R. Co. v. Russell, (C. C. A.) 183 F. 722; Chicago, G. W. R. Co. v. Shendel, 267 U. S. 287, 45 S. Ct. 303, 304, 69 L. Ed. 614. We found that absolute liability of a railroad for defective appliance "does not" as was determined and stated in Baltimore & Ohio Ry. Co. v. Hooven, 297 L. Ed. 919, 921, "follow its instrumentalities of transportation beyond their actual present use or hauling; or, more specifically, it is not the intent of the act to have absolute liability imposed by it attach to the vehicle during such time as it is withdrawn temporarily from actual service and after it has reached the place of repair and is undergoing conditioning or repair for the purpose for which it is intended and for the use to which it is assigned." We cited to the same effect Sherry v. B. & O. R. Co. (C. C. A.) 30 Fed. (2d) 487, where a car inspector in the defendant's employ was injured while inspecting a car which had been placed on a track of defendant as being in bad order; and also similar cases, McCalmont v. Pa. Ry. Co. (C. C. A.) 283 F. 736; Kaminski v. C. M. & St. P. Ry. Co. 180 Minn. 619, 231 N. W. 189; Flack v. R. Co. 285 Mo. 28, 224 S. W. 415, 423. Under those authorities, and for like reasons as in the former case, we now conclude that neither was the Terminal so using the car or permitting it to be used on its line at that time and place.

As was stated in the former case, "The statutory criterion is whether the car is 'in use' 'on its line' within the true purpose and scope of the act." This car was not; it had temporarily been withdrawn from use. It would seem that the Terminal had no license to return at will to the Wabash track and remove the car. The right to return for any of them was purely conjectural, was conditioned upon inspection to be made by the Wabash and, inferentially, notice to be given the Terminal of the rejection of such cars as were found "to be not in condition to continue their journey." The temporary withdrawal of the car for inspection and to be further kept out of use if its condition

so required, had been completed, so far as the Terminal was concerned, before the injury. And, it may be stated in passing, the Wabash did not reject but retained this car. In support of a like holding made in the former case, the opinion there contains an exhaustive review of the applicable cases, among them B. & O. R. Co. v. Hooven, supra; Southern Ry. Co. v. U. S. 222 U. S. 20, 25, 26, 32 S. Ct. 2, 56 L. Ed. 72; Texas & Pac. Ry. Co. v. Rigsby, 241 U. S. 33, 41, 36 S. Ct. 482, 60 L. Ed. 874; Southern Ry. Co. v. Snyder, 187 F. 492, 497, 109 C. C. A. 334. As was stated in the former opinion in effect, we here repeat, that in none of the extant authorities was liability held to attach when the defective car was not in actual use within the intent and purpose of the act as it has been construed by the controlling authorities.

While holding that plaintiff failed to make a case submissible under the Safety Appliance Act, we leave for consideration and determination, in connection with plaintiff's common law claim, the question whether, owing to the nature of his employment and duties, he is within the class of persons intended to be protected by said act. In turning from this phase of the case we wish to observe that we have examined respondent's citations and discovered no conflict between them and those authorities we have referred to above in the application of principles of law which we regard as controlling under the facts of this case.

II. Plaintiff's common law theory of liability, as stated in his brief, is that plaintiff was the Terminal's invitee and it owed him the positive duty to exercise ordinary care for his safety and to furnish him with a reasonably safe car without any defects which it knew or could have discovered "by a reasonable inspection."

Plaintiff asserts that the defendant, in law, had knowledge of the defective condition of the car in question, because it was its duty to inspect and it will be presumed to have performed that duty; citing the first Brady case and certain cases supra which were reviewed therein, and in which such knowledge is imputed in actions brought, as they were, under the Safety Appliance Act. Those cases involved, not common law negligence but non-compliance with the Safety Appliance Act. That branch of plaintiff's case, involving such statutory duty with its legal implication of notice of what proper inspection might have dis-

closed, is now like as water gone over the wheel, and furnishes no aid to plaintiff's common law claim of liability. The very purpose of said act was to supply the lack of the common law as to matters coming within the purview of the act.

Confessing inability to find any case in Missouri involving the common law duty of a carrier to the employees of a carrier to which the first carrier furnishes a defective or unsafe car, the plaintiff represents that the principle involved is identical with that applied where a carrier furnishes defective cars to a shipper or consignee whose employee is injured in loading or unloading such defective cars; citing a number of cases, among them Roddy v. Mo. Pac. Ry. Co. 104 Mo. 234, 15 S. W. 1112; Sanowski v. Mobile & Ohio R. Co. (Mo. App.) 207 S. W. 865; Teal v. American Min. Co. et al. (Minn.) 87 N. W. 837; St. Louis-S. F. Ry. Co. v. Evans, 26 Fed. (2d) 619. We think such authorities have no application to the situation presented here. Generally speaking, they hold that it is the carrier's duty to use ordinary care to deliver cars reasonably safe for the contemplated use of shippers and their employees while the cars are being so used by them for such purpose as loading the same or placing them in position to be loaded by the shipper for use in transportation by the receiving carrier. Here the cars were merely tendered and for the distinctly different purpose alone of inspection, and the Terminal stood in no contractual relation or privity with the Wabash in respect of its subsequent use of the cars.

The determination of the common law duty, if any, which defendant owed plaintiff in the premises is of primary importance; for in order to render any one liable to another for a negligent injury, he must have owed a duty to the latter, the violation of which was the cause of the injury. 20 R. C. L. 45. The plaintiff says that inasmuch as the service of inspection he was rendering was indirectly in furtherance of the Terminal's business and directly in furtherance of the Wabash's, and as the car was in the possession and control of the defendant at the time, plaintiff's status was that of invitee of defendant. The emphasized citations in support are Bennett v. Railroad, 102 U. S. 577, 26 L. Ed. 235; Vogt v. Wurmb, 318 Mo. 471, 300 S. W. 278; Tinkle v. St. Louis-S. F. Ry. Co. 212 Mo. 445, 110 S. W. 1086; Roman v. King, 289 Mo. 641, 233 S. W. 164; Simmons v. Jockey Club,

334 Mo. 99, 66 S. W. (2d) 119; Gilliland v. Bondurant, 332 Mo. 881, 59 S. W. (2d) 679; Degitz v. M. K. & T. R. Co. 97 Kans. 654, 156 Pac. 745. No useful purpose would be served by reviewing those cases, except the last cited one, for the situations involved in them bear no resemblance whatever to the one before us.

In the Degitz Case, supra, there was an agreement between the defendant (in that instance the delivering carrier) and the Union Pacific Railroad (the receiving carrier) that cars arriving on the M. K. & T. consigned to the Union Pacific, were to be transferred to the latter by the former by placing them on a certain transfer track of the M. K. & T. to be taken over by the Union Pacific after inspection by its employees. After so delivering three cars on the transfer track the deliverer, without signal or warning, ran its engine violently against said string of cars which the receiver's inspectors had become engaged in inspecting. Before the transfer was made the deliverer had notified the receiver that one of said cars was for shipment over the latter's line upon which a train would be going out shortly. Thus it appears that the deliverer's suggestion induced immediate inspection and affected the deliverer with imputed knowledge that the inspectors would likely proceed at once to inspect the cars. In others words, the deliverer created an extra hazard and then committed active negligence that proximately caused the injury. It is true the court there denominated the injured inspector's relation to the delivering carrier as that of invitee—an unessential if not inaccurate denomination of his status. Quite obviously, that case furnishes no parallel to this one.

Several cases of the above group define, in varying form of statement, the relation of invitee; for example: "The owner is liable to invited persons for injury occasioned by the unsafe condition of the land or its appliances, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public or to those who were likely to act upon such invitation." Bennett v. Louisville, etc. Ry. Co., supra.

In the plaintiff's former case, supra, we held that in transferring the string of cars to the Wabash track for inspection the Terminal was a licensee of the former. The line of demarcation between the status of licensee and that of invitee is oft-imes shadowy and indistinct, and in a general sense

one who is invited on premises is a licensee. 45 C. J. 790. The distinction deducible from the authorities may be stated thus: An invitee to a place of business is one who goes there, either at the express or implied invitation of the owner or occupant, on business of mutual interest to them both, or in connection with business of the owner or occupant which is there being carried on; while a licensee is one who goes on property of another either by express invitation or with his implied acquiescense, solely in pursuit of the licensee's own business, pleasure or convenience. "It is frequently said that this element of interest in, or benefit to, the owner or occupant, or mutual interest or benefit, is necessary to give rise to an implied invitation, and in the absence thereof the person entering does not occupy the status of invitee." 45 C. J. 813.

Granted that the cars were still (in the legal sense) in the possession of the Terminal; had it not relinquished the right of control, not to regain it in any part unless and until a car or cars might prove unfit for its or their journey, in which event it or they would be rejected by the Wabash? We think so. Such, even, was contingent upon the then indeterminate fact of acceptance or rejection and might or might not become a matter of mutual interest or concern to both carriers, or to the Terminal alone, and in respect of rejected cars only; for only such was the Terminal required to remove from the transfer track. The evidence does not show in this instance that any car was rejected but does affirmatively show that the car in question was retained by the Wabash and (inferentially) by it repaired. The inference seems a fair one, that rejection was exceptional and acceptance usual; also, that in the matter of the Wabash's inspection the element of mutuality was wholly lacking as between the Terminal and the Wabash. It seems perfectly obvious that they stood in a reciprocal rather than mutual relation to each other. Such tendering of the cars and such accepting of them, did not constitute a joint enterprise but constituted separate and distinct acts of reciprocity. The duties of each, therefore, with respect thereto pertained only to its own separate act. As already stated we held in plaintiff's former case that the Terminal was a licensee. Inevitably then, the reciprocal relation of the Wabash was that of licensee of the Terminal; or, if invitee of the latter, then the Terminal was an invitee of the Wabash. We are

of the opinion each was a licensee of the other. The plaintiff stood in the shoes of the Wabash. Except in the interest of accuracy in definition or in legal terminology it little matters, in this case, what was the exact status for reasons which will later appear.

Recurring now to the question of alleged knowledge and "timely notice", in their common law aspect, as imposing a duty upon the Terminal concerning the defective grabiron. As shown above, the question of knowledge as imputed by the Safety Appliance Act is not relevant to plaintiff's specification of common law negligence. However, the plaintiff in this latter connection contends that the evidence warranted a finding that "after the Terminal had properly performed its duty to inspect it had actual knowledge of the defective condition (necessarily of long standing, in view of the then rottenness of the board referred to) at the time it received the car some four days before the injury, or during said period; and if it failed to inspect, it had implied knowledge because the same could have been discovered, by the exercise of ordinary care, in performing the duty of inspection." Doyle v. Bridge Terminal R. Co. (Mo. App.) 31 S. W. (2d) 1010 is cited. That was a master and servant case, brought under the Federal Employer's Liability Act. It was held therein that the fact old rusted wire over which the servant tripped was securely imbedded in the ground, worn solid and smooth, warranted an inference that the master had constructive knowledge in time to have removed it in due care. Manifestly, that case has no application to this one.

It will be observed that in the closing part of the above contention it is impliedly conceded that the Wabash—and by the same token the plaintiff—in making the contemplated inspection could, in the exercise of ordinary care, have discovered the defect. The contention implies, also, that the Wabash had previously failed to make such inspection before delivery of the long-time defective car to the Terminal in the first place—an omission upon its part by one degree more remote than the Terminal's in point of causation. The question of timely notice, or warning, is not in the case as there is no specification in the pleadings respecting that matter.

Under the facts in this record we are of the opinion that under common law rules no duty to the Wabash rested upon

the Terminal to make an inspection, and, it inevitably follows, no duty to the plaintiff. It was the Wabash's duty that plaintiff was performing, and in the performance thereof he and the Wabash were one in their relation to the Terminal. The very nature of this duty would bar the Wabash and, by the same token, the plaintiff. In speaking of the master's non-delegable common law duty of inspection, Judge Thompson in his work on negligence (Vol. 4 Sec. 3791) said:

"The duty of inspection is an absolute duty. The master must see that the proper inspections are actually made. The meaning is, that the person of whatsoever grade in the service, appointed to discharge this duty of inspection, is the master's alter ego."

Certainly the plaintiff as well as the Wabash had no right to expect, and their course of conduct shows they did not expect, that the Terminal would not deliver defective or uninspected cars. Liability of the defendant is by the plaintiff predicated upon the fact that the defect could have been discovered in the exercise of ordinary care by inspection. The plaintiff was under duty to make such inspection and from experience he was acquainted with the danger inherent therein.

So, under the facts, irrespective of whether the plaintiff was in the exercise of reasonable care for his own safety, it appears that his injuries were proximately due to his own voluntary exposure of himself to known and appreciated danger incident to the work in which he was engaged (45 C. J. pp. 1043-1044, see also, on "incurred risk" Stein v. Oil & Grease Co., 327 Mo. 804, 816, 39 S. W. (2d) 349), and, the premises considered, that the defendant was under neither statutory nor common law liability to the plaintiff. The case is most unfortunate for plaintiff, but as the verdict was not based on liability under the law, it, like the verdict in plaintiff's former case, can not rightly be permitted to stand. Accordingly, the judgment is reversed.

Charles Thomas Hays, Judge.

The foregoing opinion by Hays, J., in Division One is adopted as the opinion of the Court en Banc. All concur.

And thereafter and on the 1st day of March, 1937, the following further proceedings were had and entered of record in said cause, to-wit:

No. 33525

THOMAS J. BRADY, Resp.,

vs.

TERMINAL RAILROAD ASSN., App.

Comes now the respondent, by attorney, and files herein a motion for a rehearing and motion to modify opinion.

Which said motion for a rehearing and motion to modify opinion are in words and figures following, to-wit:

IN THE SUPREME COURT OF MISSOURI, EN BANC, SEPTEMBER TERM, 1936

No. 33,525

THOMAS J. BRADY, Respondent,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation, Appellant

MOTION OF RESPONDENT FOR A REHEARING

Comes now Thomas J. Brady, respondent in the above entitled cause, and moves the court to set aside its opinion, decision and judgment rendered herein on the 19th day of February, 1937, and to grant respondent a rehearing herein for the following reasons:

I

The opinion, decision and judgment of the court, in ruling, substantially, that the defendant was not "using or permitting to be used on its lines" the car upon which plaintiff was working at the time of his injury, within the purpose and scope of the Federal Safety Appliance Act, but that said car had been temporarily withdrawn from

service and use at the time of plaintiff's injury, is in direct conflict with the following controlling decisions of the Supreme Court of the United States:

Chicago G. W. R. Co. v. Schendel, 267 U. S. 287, 45 S. Ct. 303, 69 L. Ed. 614;

Delk v. St. Louis & S. F. R. Co., 220 U. S. 580, 31 S. Ct. 617, 55 L. Ed. 590;

and the following decisions of other Federal Courts:

Erie R. Co. v. Russell, 106 C. C. A. 160, 183 Fed. 722 (Writ of error dismissed, 220 U. S. 607, 31 S. Ct. 722, 55 L. Ed. 607);

United States v. St. L. S. W. R. Co., 106 C. C. A. 230, 184 Fed. 28.

II

The opinion, decision and judgment of the court misconstrues Baltimore & Ohio R. Co. v. Hooven, 297 Fed. 919; McCalmont v. Pennsylvania R. Co., 283 Fed. 736; Sherry v. Baltimore & Ohio R. Co., 30 Fed. (2d) 487, and kindred cases, which this court deems controlling, in that in those cases the cars in question were actually "withdrawn from use and service" by having been placed upon repair tracks for the purpose of being repaired prior to the injury, while in the instant case the cars upon which plaintiff was working at the time of his injury were placed upon a general switch track used for the interchange or transfer of cars, for the purpose of effectuating a transfer of them from the defendant to the Wabash Railway Company.

III

The opinion, decision and judgment of the court overlooked the following points, to wit:

(a) The car upon which plaintiff was injured, together with the other cars in that train, had been placed by the defendant upon the Wabash Railway Company's inbound, or receiving, track for the primary purpose of tendering those cars to the Wabash in order to effectuate a transfer of them from the defendant to the Wabash, and the inspection of such cars by the Wabash was but an incident to such transfer. These cars were, accordingly, not "withdrawn from service and use" by the defendant, but were in actual

use by the defendant for the purpose of making such tender and effectuating such transfer.

(b) In Brady v. Wabash Ry. Co., 329 Mo. 1123, 49 S. W. (2d) 24, this court ruled only that the defective car in question was not being "hauled or used" by the defendant there, the Wabash Railway Company, and did not hold generally "that the car was not being hauled at the time of plaintiff's injury, but that its movement had ended some four hours before when the cars were placed upon the exchange track of the Wabash by defendant," as stated at page 3 of the typewritten opinion in the instant case.

IV

The opinion, decision and judgment of the court, in holding, substantially, that the car upon which plaintiff was working at the time of his injury, together with approximately fifty other cars in that same drag, were temporarily withdrawn from use "for inspection and to be further kept out of use if its condition so required" (Typewritten Opinion, p. 5), overlooks the basic and elementary fact that the placing of these cars upon the Wabash inbound, or receiving, track was for the purpose of tendering them to the Wabash for transfer, so that their movement and carriage could be continued, the inspection being a mere incident to such transfer—"the Wabash could or not inspect it, as it saw fit," as the appellant so aptly puts it in its brief at page 39.

Eagleton, Waechter, Yost, Elam and Clark, Attorneys for Respondent.

Receipt of a copy of the above and foregoing Motion, together with a copy of the suggestions in support thereof thereto attached, is hereby acknowledged, and service of notice of the filing thereof is hereby waived, this 26th day of February, 1937.

T. M. Pierce, J. L. Howell, Walter N. Davis, Attorneys for Appellant.

IN THE SUPREME COURT OF MISSOURI, EN BANC, SEPTEMBER TERM, 1936

No. 33,525

THOMAS J. BRADY, Respondent,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation, Appellant

SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING

In view of the fact that this respondent has heretofore filed in Division No. 1 of this court his suggestions in support of a motion for rehearing also filed in that division, which suggestions are pertinent here, and which suggestions were thereafter, substantially, incorporated in respondent's supplemental brief, the respondent will not here burden this court with a lengthy discussion, but does respectfully refer the court to the suggestions previously filed in Division No. 1.

There is, however, something further to be said by respondent concerning this matter. The evidence in this case distinctly and unequivocally established that the car upon which plaintiff was working at the time of his injury was but one of a train consisting of approximately fifty cars, which train had been moved interstate by the defendant and placed upon the Wabash Railway Company's "inbound" or "receiving" track for the primary purpose of making a tender so as to effectuate a transfer of those cars from defendant to the Wabash (Abs. 79), and that the inspection being made by the plaintiff was for the purpose of determining whether the cars in that train were in a safe and serviceable condition to continue on their journey (Abs. 25, 70).

The effect of the decision in the instant case, together with the decision of this court in the case of Brady v. Wabash Ry. Co., 329 Mo. 1123, 49 S. W. (2d) 24 (certiorari denied 287 U. S. 619, 53 S. Ct. 20, 77 L. Ed. 538), is to hold that in every instance when cars are placed by one connecting interstate carrier in a stationary condition upon a transfer or interchange track for the purpose of effectuating a transfer of those cars to another interstate carrier, such cars are with-

drawn from service and use, are not being hauled or used by either of the connecting carriers or anyone else, and are not in the service of anyone, until such time as they are again placed in movement by the receiving carrier, notwithstanding that such cars may then and there be consigned in interstate commerce with their transportation not completed, and that the further hauling and transportation of such cars to their destination or destinations is within the immediate intention and contemplation of both carriers. This paradox necessarily results from this court's recognition that extensive inspections will generally be made by the receiving carrier and some delay in the movement of cars during interchange or transfer will necessarily result therefrom, for under the Safety Appliance Act it is the non-delegable duty of the receiving carrier

"* * * to inspect for itself and *ascertain at its peril,* before accepting the tendered cars for shipment on its lines or handling them in any way—except perhaps to make necessary repairs,—that such cars were equipped in *every way* and complied in *every respect* with the requirements of the Safety Appliance Act; * * *." (Typewritten Opinion, p. 3.)

Of course, the receiving carrier may inspect or not, as it sees fit, and that fact demonstrates that the inspection is a mere incident to the transfer or interchange.

Likewise, the effect of the decisions of this court in the instant case and in Brady v. Wabash Ry. Co., supra, is to hold that every railroad car which stands stationary upon a switch track of any character, whether such track is used for general switching or otherwise, is "withdrawn from service and use" so long as it remains motionless, for, if a car is "withdrawn from service and use" merely by being placed in a stationary condition upon a switch track for the purpose of an inspection incident to a transfer from one connecting carrier to another, then, by the same token, a car would be "withdrawn from service and use" merely by being placed in a stationary condition upon a switch track for any other purpose. The fact that the car was in a stationary condition, rather than the purpose of it being so placed, would control the issue as to whether it was then in service or use. Such, we submit, is not and cannot be the law.

The respondent most respectfully submits that, for the foregoing reasons, the opinion and decision of this court in the instant case is in direct conflict with the controlling decisions in Delk v. St. Louis & S. F. R. Co., 220 U. S. 580, 31 S. Ct. 617, 55 L. Ed. 590; Chigago G. W. R. Co. v. Schendel, 267 U. S. 287, 45 S. Ct. 303, 69 L. Ed. 614; Erie R. Co. v. Russell, 106 C. C. A. 160, 183 Fed. 722 (writ of error dismissed 220 U. S. 607, 31 S. Ct. 722, 55 L. Ed. 607); and United States v. St. Louis S. W. R. Co., 106 C. C. A. 230, 184 Fed. 28, and that, accordingly, respondent's motion for a rehearing herein should be sustained.

Respectfully submitted, Eagleton, Waechter, Yost, Elam and Clark, Attorneys for Respondent.

IN THE SUPREME COURT OF MISSOURI, EN BANC, SEPTEMBER TERM, 1936

No. 33,525

THOMAS J. BRADY, Respondent,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation, Appellant

RESPONDENT'S MOTION TO MODIFY OPINION

Comes now Thomas J. Brady, respondent in the above entitled cause, and moves the court to modify its opinion in this cause so as to state the facts pertinent to the issue as to whether the car upon which plaintiff-respondent was working at the time of his injury was then and there being "hauled or used" by defendant upon its lines, by showing the following:

That, on the day of plaintiff's injury, the car upon which plaintiff was working when injured was, together with approximately fifty other cars (Abs. 25), hauled by defendant from St. Louis, Missouri, to Granite City, Illinois (Abs. 25, 39), where defendant's railroad line had a connection with the line of the Wabash Railway Company; that all of these cars were there placed by defendant upon track No. 11, sometimes referred to in the evidence as the "inbound"

or "receiving" track, in the Granite City Yards of the Wabash Railway Company (Abs. 24, 78) at about 6:00 P. M. on that day (Abs. 78), which was some three hours before plaintiff's injury (Abs. 25); that this entire train of approximately fifty cars, after having been placed by defendant, as aforesaid, remained there until the time of plaintiff's injury, coupled together, and just as they had been left there by defendant (Abs. 40); that these cars were so placed by defendant in order to tender them to the Wabash for further transportation (Abs. 79), some of such cars then and there containing shipments moving in interstate commerce (Abs. 40), and being destined to cities located in states other than Missouri and Illinois (Abs. 41); that, at the time of his injury, plaintiff was engaged in inspecting these cars for the purpose of determining whether the Wabash Railway Company would accept them for further transportation (Abs. 25, 70); that if the car and its equipment were found by such inspection to be in a good and safe condition to continue its journey, the car would be marked or carded and accepted by the Wabash for further transportation—otherwise it would be rejected and taken back by defendant (Abs. 25); and that, at the time of plaintiff's injury, this train of cars, including the one upon which plaintiff was working at the time of his injury, were in the possession of the defendant, not having as yet been delivered to, and accepted by, the Wabash Railway Company (Abs. 38, 39).

And for grounds for his motion, respondent states that the opinion rendered by this court in this cause does not contain a sufficient statement of the case so that it may be understood without reference to the record and proceedings in the case, contrary to the provisions of Section 1068 of the Revised Statutes of Missouri, 1929.

Eagleton, Waechter, Yost, Elam and Clark, Attorneys for Respondent.

Receipt of a copy of the above and foregoing Motion is hereby acknowledged, and service of notice of the filing thereof is hereby waived, this 26th day of February, 1937.

T. M. Pierce, J. L. Howell, Walter N. Davis, Attorneys for Appellant.

And thereafter and on the 24th day of March, 1937, the following further proceedings were had and entered of record in said cause, to-wit:

No. 33525

THOMAS J. BRADY, Resp.,

vs.

TERMINAL RAILROAD ASSN., App.

Now at this day, the Court having seen and fully considered respondent's motion for a rehearing, and motion to modify opinion, doth order that said motions be, and the same are hereby overruled.

STATE OF MISSOURI, sct:

I, E. F. Elliott, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the foregoing pages present a full, true and correct copy of the record and proceedings in the case of Thomas J. Brady, respondent, against Terminal Railroad Association of St. Louis, a corporation, appellant, No. 33,525, as fully and completely as the same appear of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said Supreme Court of the State of Missouri, at my office in the City of Jefferson, this 9th day of April, 1937.

E. F. Elliott, Clerk, Supreme Court of Missouri.
(Seal of the Supreme Court of Missouri.)

[fol. 177] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING PETITION FOR REHEARING AND CERTIORARI—November 8, 1937

It appearing that the judgment of the Supreme Court of Missouri is a final judgment under the decisions of that Court cited by petitioner in his petition for rehearing, the petition is granted, the order denying a writ of certiorari is vacated and the writ of certiorari is granted.

[fol. 178] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 8, 1937

The petition herein for a writ of certiorari to the Supreme Court of the State of Missouri is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 41,644. Missouri Supreme Court. Term No. 163. Thomas J. Brady, petitioner, vs. Terminal Railroad Association of St. Louis. Petition for a writ of certiorari and exhibit thereto. Filed June 22, 1937. Term No. 163, O. T., 1937.

FILE COPY

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JUN 22 1937
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 163

THOMAS J. BRADY,

Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

MARK D. EAGLETON,
Counsel for Petitioner.

MERRITT U. HAYDEN,
ROBERTS P. ELAM,
Of Counsel.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Statement of proceedings	2
Summary and short statement	5
Specifications of error	9
Opinions of the courts below	10
Jurisdiction of this Court	10
Summary of reasons for allowance of writ	12
Prayer for writ	13
Brief in support of petition	15
Argument	18
Appendix—Sections of Federal Safety Appliance Act involved	34

Table of Cases Cited.

Atlantic Coast Line Co. v. *Davis*, 279 U. S. 34, 49 Sup. Ct. 210, 73 L. Ed. 601	11
Baltimore & O. R. Co. v. *Hooven*, 297 Fed. 919	28
Baltimore & O. S. W. R. Co. v. *Burtch*, 263 U. S. 540, 44 Sup. Ct. 165, 68 L. Ed. 433	16, 24
Brady v. *Terminal Railroad Assn. of St. Louis*, 102 S. W. (2d) 903	5, 8, 10, 25
Brady v. *Wabash Ry. Co.*, 329 Mo. 1123, 49 S. W. (2d) 24	7, 9, 24, 27
Brady v. *Wabash Ry. Co.*, 287 U. S. 619, 53 Sup. Ct. 20, 77 L. Ed. 538	8
Chicago, G. W. R. Co. v. *Schendel*, 267 U. S. 287, 45 Sup. Ct. 303, 69 L. Ed. 614	15, 22
Davis v. *Wolfe*, 263 U. S. 239, 44 Sup. Ct. 64, 68 L. Ed. 284	17, 31
Delk v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590	16, 21
Didinger v. *Pennsylvania R. Co.*, 39 F. (2d) 798	17
Erie R. Co v. *Russell*, 106 C. C. A. 160, 183 Fed. 722,	16, 23, 28
Fairport, C. & E. R. Co. v. *Meredith*, 292 U. S. 589, 54 Sup. Ct. 826, 78 L. Ed. 1146	17, 30, 31
Great Northern R. Co. v. *Otos*, 239 U. S. 349, 36 Sup. Ct. 124, 60 L. Ed. 322	16, 23
Gulf M. & N. R. Co. v. *Wells*, 275 U. S. 455, 48 Sup. Ct. 151, 72 L. Ed. 370	11

Page

Johnson v. *Southern Pacific R. Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363 ..... 16, 21
Louisville & N. R. Co. v. *Layton*, 243 U. S. 617, 37 Sup. Ct. 456, 61 L. Ed. 931 ..... 17, 31
McCalmont v. *Pennsylvania R. Co.*, 283 Fed. 726 28
Minneapolis St. P. & S. S. M. R. Co. v. *Goneau*, 269 U. S. 406, 46 Sup. Ct. 129, 70 L. Ed. 335 ..... 11, 16, 26
McNeill v. *Southern Ry. Co.*, 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142 ..... 16, 24
New York, etc. R. Co. v. *Kelly*, 70 F. (2d) 548 28
New York Central R. Co. v. *Marcone*, 281 U. S. 345, 50 Sup. Ct. 294, 74 L. Ed. 892 ..... 16. 23
Rhodes v. *Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088 ..... 16, 24
Seaboard Air Line R. Co. v. *Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062 11
Sherry v. *Baltimore & O. R. Co.*, 30 F. (2d) 487 28
St. Louis & S. F. R. Co. v. *Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129 ..... 16, 24
Swinson v. *Chicago St. P. M. & O. R. Co.*, 294 U. S. 529, 55 Sup. Ct. 517, 79 L. Ed. 1041 ..... 17, 29, 31
United States v. *Chicago, M. & St. P. R. Co.*, 149 Fed. 486 29
United States v. *St. Louis S. W. R. Co.*, 106 C. C. A. 230, 184 Fed. 28 ..... 16, 23
Walsh v. *New York, N. H. & H. R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327 ..... 16, 23

STATUTES CITED.

Act of Cong., March 2, 1903, c. 976, Sec. 1, 32 Stat. 943, U. S. Code, Title 45, Sec. 8 15
Federal Employers' Liability Act (U. S. Code, Title 45, Sections 51-59) 7
Federal Safety Appliance Act, Act of Cong., April 14, 1910, c. 160, Sec. 2, 36 Stat. 298, U. S. Code, Title 45, Section 11 ..... 2, 10, 15
Judicial Code, Section 237, as amended by the Act of February 13, 1925, 43 Stat. 937, U. S. Code Title 28, Section 344 (b) 10

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 163

THOMAS J. BRADY,

Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,

A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes Thomas J. Brady, petitioner, and respectfully petitions this Honorable Court to grant a writ of certiorari to the Supreme Court of the State of Missouri, and to remove therefrom to this Court for review, the record in the case lately pending in said Supreme Court of the State of Missouri, styled Thomas J. Brady, respondent, *vs.* Terminal Railroad Association of St. Louis, a corporation, appellant, being Cause No. 33,525 on the docket of said Supreme Court of the State of Missouri.

The duly certified record, including all the proceedings in the Circuit Court of the City of St. Louis, Missouri, where

said cause was tried, and in the Supreme Court of the State of Missouri, to which an appeal was taken by said Terminal Railroad Association of St. Louis from the judgment of the trial court, is filed herewith under separate cover.

Your petitioner represents that he is aggrieved by the judgment of the Supreme Court of the State of Missouri, entered in said cause, wherein the said Supreme Court of Missouri reversed the judgment of the trial court, and on the 24th day of March, 1937, thereafter, denied this petitioner's motion, as respondent in said cause, for a rehearing of said cause, and entered a final judgment reversing the judgment of the trial court.

Your petitioner states that the matters of issue in said cause are of a Federal nature and are of peculiar gravity and importance, in that the suit was brought to recover damages for personal injuries sustained by this petitioner on November 20, 1927, as a result of the violation by the respondent Terminal Railroad Association of St. Louis of the Federal Safety Appliance Act (Act of March 2, 1893, as amended), and in that the decision of the Supreme Court of the State of Missouri, complained of, is in direct conflict with the applicable decisions of this Honorable Court upon the questions involved, and the principles announced by this Court in those decisions.

Statement of Proceedings.

This action, based upon Section 11 of the Federal Safety Appliance Act (Act of Cong., April 14, 1910, c. 160, Sec. 2; 36 Stat. 298; U. S. Code, Title 45, Sec. 11), was brought on August 17, 1929, in the Circuit Court of the City of St. Louis, Missouri, by your petitioner, Thomas J. Brady (sometimes hereinafter called the plaintiff), to recover damages for personal injuries sustained by him on November

20, 1927, while in the employ of the Wabash Railway Company as a car inspector engaged in interstate commerce, when he fell from an interstate train in the City of Granite City, Illinois, as the result of an insecure grabiron or handhold on the roof at the top of the ladder of a car of said train.

In the trial court, the case was tried on a third amended petition (R. 2-5), which alleged that this petitioner, his employer the Wabash Railway Company, and the respondent Terminal Railroad Association of St. Louis, were engaged in interstate transportation at the time in question; that petitioner, in the performance of his duties as a car inspector for the Wabash Railway Company, was required to go upon and inspect the cars of a certain interstate freight train to determine whether or not such cars were to be accepted or rejected by the Wabash Railway Company; that said cars were destined in interstate commerce, having interstate freight therein, and to be further moved in interstate commerce; that, in order to climb upon one of said cars, plaintiff used a ladder and grabiron or handhold that was then and there upon said car; that immediately prior to said time, said freight car was hauled and moved by the respondent Terminal Railroad Association of St. Louis and tendered by said Terminal Railroad Association of St. Louis to the Wabash Railway Company, equipped with an insecure grabiron or handhold on the roof of said car; that when petitioner, Thomas J. Brady, took hold of said grabiron, said grabiron became detached from said car, causing petitioner to fall to the ground below, to his injury; that petitioner's said injury occurred as a result of a violation by respondent of the Laws of the United States (Act of Cong., April 14, 1910, c. 160, Sec. 2; 36 Stat. 298; U. S. Code, Title 45, Sec. 11), which required that all

cars having ladders be equipped also with secure handholds or grabirons on their roofs at the top of said ladders (R. 2-3).

The answer of respondent Terminal Railroad Association to the third amended petition (R. 6-7) pleaded a general denial; further, that on the occasion mentioned in plaintiff's third amended petition, plaintiff was engaged in his duties as a car inspector, with respect to cars tendered to the Wabash Railway Company by the respondent Terminal Railroad Association of St. Louis, to determine by inspection whether or not cars so tendered were defective as to safety appliances or otherwise, and that as such inspector inspecting cars so tendered to said Wabash Railway Company by respondent Terminal Railroad Association of St. Louis, plaintiff (petitioner here) was not within the class of persons for whose benefit the Safety Appliance Act was enacted; further, that the risk of the injury sustained by plaintiff (this petitioner) was a necessary incident to his employment as a car inspector by the Wabash Railway Company; and, further, that plaintiff (this petitioner) was guilty of contributory negligence in grabbing a handhold or grabiron on a car without first testing and trying said handhold or grabiron to determine whether or not it was secure.

The reply of the plaintiff (petitioner here) to the answer (R. 8) was by way of general denial.

Trial was had before the court and a jury and resulted in a verdict and judgment in favor of this petitioner in the sum of fifteen thousand dollars ($15,000.00) (R. 8-9). An appeal was duly perfected to the Supreme Court of Missouri (R. 9-10, 141-146), where the judgment was, on February 19, 1937, reversed (R. 173-174).

This petitioner, in due time, filed in the said Supreme Court of Missouri his motion for a rehearing, which was

entertained, but on the 24th day of March, 1937, the said Supreme Court of the State of Missouri denied said motion for a rehearing (R. 191). The said Supreme Court of Missouri having denied petitioner's motion for a rehearing on said date, the judgment of said court became final. (See *Brady* v. *Terminal Railroad Assn. of St. Louis* (Mo. Sup.), 102 S. W. (2d) 903).

Summary and Short Statement.

The circumstances attending petitioner's injury were shown with practically no dispute as to the facts, which, in brief, are as follows:

The respondent Terminal Railroad Association of St. Louis, and the Wabash Railway Company, were, and are, connecting common carriers by railroad, engaged in interstate commerce and transportation (R. 79, 80), and having a connection at Granite City, Illinois, by means of a transfer or interchange track, sometimes referred to in the evidence as "track No. 11," the "inbound track," or the "receiving track" (R. 24, 41).

The petitioner was, at the time of his injury, and for about three and one-half years before that time had been, a car inspector employed by the Wabash Railway Company in its yards at Granite City, Illinois, which included the transfer or interchange track above referred to (R. 24), it being his duty to inspect cars hauled into that switch yard by other railroads for transfer to the Wabash (R. 23, 69, 70). Petitioner was injured on November 20, 1927, about 9:00 or 9:30 P. M. (R. 23), while engaged in inspecting a "cut" or "drag" of cars which was upon the transfer or interchange track referred to above (R. 24, 41). There were between 50 and 60 cars in the "cut" or "drag" of cars which was being inspected (R. 25). These cars had been hauled, coupled together as a unit or train (R.

39), by the respondent Terminal Railroad Association of St. Louis from St. Louis, Missouri, to Granite City, Illinois, a distance of some 10 or 12 miles, and placed by the respondent Terminal Railroad Association of St. Louis upon this particular track, some 2 or 3 hours before plaintiff's injury (R. 25, 78). The purpose of respondent Terminal Railroad Association of St. Louis in so moving and placing the cut or drag of cars was, concededly, to tender them to the Wabash Railway Company for transfer to, and hauling by, the Wabash (R. 6, 7, 79). At the time the inspection was being made, there were no engines or locomotives attached to the cars (R. 24, 39), and the cut or drag of cars had not been broken up before the inspection, the entire cut or drag being left standing there coupled together just as it was brought in by the respondent Terminal Railroad Association of St. Louis (R. 40). In the cut or drag were cars which were moving in interstate commerce, cars containing shipments which were being transported in interstate commerce, and cars which were destined to foreign cities located in states other than the State of Missouri and the State of Illinois (R. 39, 40, 41).

The petitioner and the other car inspector, named Rhine, were inspecting the cars in this cut or drag for the purpose of determining whether the cars were to be accepted or rejected by the Wabash (R. 24, 25, 73). If the inspectors found that the equipment was in a good and safe condition to permit a car to continue its journey, and the car contained no defects in its safety appliances, the car would be marked or carded, and if it was not in such condition, the car would be rejected and taken back by the Terminal Railroad Association of St. Louis, respondent here (R. 25, 70, 73).

Petitioner and his fellow worker had inspected thirty-five or forty of the cars in the cut prior to petitioner's injury (R. 26). In doing this work, they first inspected the car

from the ground, and then went up on the roof or top of the car (R. 26). Petitioner was climbing up the side ladder at the corner of one of the cars in this particular cut or drag, and when he attempted to use the handhold or grabiron on the roof of the car at the top of the ladder to raise himself up onto the top of the car, the handhold, and the latitudinal running-board to which it was attached, pulled loose and caused him to fall backwards to the ground and sustain injuries (R. 26-33, 66-69). The grabiron or handhold was not secure, and the wood of the latitudinal running-board, to which the grabiron was attached, was old and rotted out (R. 31-32, 69).

Prior to the petitioner's injury, the cars in this cut or drag had not been accepted by the Wabash Railway Company (R. 38), the cars having just been placed on the track there for tender to the Wabash (R. 6, 7), and the Wabash not having moved the cars, nor done anything in connection therewith, except to detail petitioner and Rhine to inspect them (R. 40).

Petitioner first brought suit for his injuries against his employer, the Wabash Railway Company (R. 65, 66), basing his action upon the Federal Employers' Liability Act (U. S. Code, Title 45, Sections 51-59) and the Safety Appliance Act (U. S. Code, Title 45, Section 11). He recovered a verdict and judgment in the trial court. That judgment was reversed, on appeal, by the Supreme Court of Missouri (see *Brady* v. *Wabash Railway Co.*, 329 Mo. 1123, 49 S. W. (2d) 24), the court assigning, as its reason for such reversal, that petitioner had failed to make a submissible case against his employer, the Wabash Railway Company, under the Safety Appliance Act, in that the car from which petitioner fell to his injury, although concededly not equipped with a secure grabiron or handhold as required by that act, had not yet been ac-

cepted by the Wabash Railway Company, and that that company had not, therefore, "hauled or used" such defective car, nor permitted it to be "hauled or used upon its line," within the prohibition of the Safety Appliance Act, notwithstanding that the Terminal Railroad Association of St. Louis had hauled the cut or drag of cars a distance of some two miles over the Wabash Railway Company's transfer or interchange tracks. This Court denied certiorari to review that decision of the Missouri Supreme Court. (See *Brady* v. *Wabash Ry. Co.*, 287 U. S. 619, 53 S. Ct. 20, 77 L. Ed. 538.)

Following the adverse outcome of his action against his employer as aforesaid, on June 14th, 1935 (R. 10) petitioner proceeded with the prosecution of the suit and proceedings here sought to be reviewed, against the respondent delivering carrier which had tendered to petitioner's employer a car not equipped with a secure grabiron or handhold as required by Section 11 of the Safety Appliance Act. As stated heretofore, petitioner recovered a verdict and judgment in the trial court (R. 141), which, on appeal, was reversed by the Supreme Court of Missouri (R. 173-184; see, also, *Brady* v. *Terminal Railroad Assn. of St. Louis* (Mo. Sup.), 102 S. W. (2d) 903). In its opinion (R. 174-184), the Supreme Court of Missouri assigned, as its reason for reversing the judgment, that the respondent Terminal Railroad Association of St. Louis was not "hauling or using" the defective car which caused petitioner's injury, nor "permitting it to be hauled or used upon its line," within the prohibition of the Safety Appliance Act, at the time and place of petitioner's injury, and that the car had been temporarily "withdrawn from use" for inspection incident to the tender of the car by the respondent Terminal Railroad Association of St. Louis

for transfer from respondent to the petitioner's employer, the Wabash Railway Company (R. 177, 178).

In this connection, the Supreme Court of Missouri, in its opinion here sought to be reviewed, as well as in its opinion in *Brady* v. *Wabash Railway Co.*, 329 Mo. 1123, 49 S. W. (2d) 24 (which is the basis for the opinion here sought to be reviewed), makes a distinction between the word "use," as employed in the Safety Appliance Act, and "actual use." The opinions of that court hold that the car in question, although it was shown without dispute to be defective in that it did not have a secure grabiron or handhold such as was required by the Safety Appliance Act, and although it was shown without dispute to be in use by the respondent Terminal Railroad Association for the purpose of making a tender for transfer to the Wabash, and in use by the Wabash for the purpose of being inspected to determine whether it would be accepted or rejected, was not "in use" by either of those connecting railroads within the meaning of, and in violation of, the Safety Appliance Act.

Specifications of Error.

The judgment secured by petitioner in the trial court was reversed by the Supreme Court of Missouri under an erroneous interpretation of the Federal Safety Appliance Act as applied to the facts in this case, in the following particulars:

1. Error in failing and refusing to hold that the train which was being inspected by petitioner, and the cars therein, were in use by respondent, in the sense in which that word is employed in the Federal Safety Appliance Act, and in failing and refusing to hold that such use of the train and car in question, with the grabiron or hand-

hold in an insecure condition, constituted a violation of that act.

2. Error in holding that petitioner failed to make a case showing respondent's liability under the Federal Safety Appliance Act.

3. Error in holding that the trial court erred in not directing a verdict in favor of the respondent.

Opinions of the Courts Below.

There was no opinion of the trial court in the case here sought to be reviewed.

The opinion of the Supreme Court of the State of Missouri appears at pages 174 to 183, inclusive, of the printed transcript of the record herewith filed. It is reported in 102 S. W. (2d), p. 903 (Advance Sheet No. 3, April 20, 1937). The case is not yet reported in the official Missouri Reports.

Jurisdiction of this Court.

1.

Jurisdiction of this Court is based upon the Judicial Code, Section 237, as amended by the Act of February 13, 1925, 43 Stat. 937, U. S. Code, Title 28, Section 344, Paragraph (b), permitting petitions for certiorari to be prayed for and issued to the highest courts of the various States where a title, right, privilege or immunity is specially set up or claimed under a statute of the United States.

The action here sought to be reviewed, having been based upon the Federal Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531, as amended April 14, 1910, c. 160, 36 Stat. 298 (U. S. Code, Title 45, Section 11), the jurisdiction of this Court attaches because the Supreme Court of Missouri, in reversing the judgment of the trial

court, has decided a Federal question of substance in a way not in accord with the applicable and controlling decisions of this Court. Some authorities sustaining the jurisdiction are:

Seaboard Air Line R. Co. v. *Horton,* 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062;

Minneapolis, St. P. & S. S. M. R. Co. v. *Goncau,* 269 U. S. 406, 46 S. Ct. 129, 70 L. Ed. 335;

Gulf M. & N. R. Co. v. *Wells,* 275 U. S. 455, 48 S. Ct. 151, 72 L. Ed. 370;

Atlantic Coast Line Co. v. *Davis,* 279 U. S. 34, 49 S. Ct. 210, 73 L. Ed. 601.

2.

The Supreme Court of Missouri is the highest court of that State.

The original date of the judgment of the Supreme Court of Missouri here sought to be reviewed is February 19, 1937.

Petitioner's motion for a rehearing was filed March 1, 1937, within the time provided by the rules of the Supreme Court of Missouri, and said motion for rehearing was overruled March 24, 1937.

3.

Only one question is raised in this Court on this record. That question is whether the cars of a train, containing shipments then being transported in interstate commerce, hauled by one connecting carrier and placed by it upon the transfer or interchange track of another connecting carrier, and there left standing so as to be tendered for transfer to the latter connecting carier for further transportation, are in use, within the meaning of the Safety Appliance Act (U. S. Code, Title 45, Sec. 11), so as to render the tendering carrier liable to an employe of the other

carrier who, while inspecting the cars to determine whether they will be accepted or rejected, is injured by a handhold or grabiron, such as is required by that act, being insecure and pulling out of one of the cars.

Summary of Reasons for Allowance of Writ.

I.

In this case the Supreme Court of Missouri has decided a Federal question of substance, not heretofore determined by this Court upon a like statement of facts, in a way not in accord with the applicable and controlling principles and decisions of this Court.

The question is one of a general nature, involving the rights and liabilities of all interstate carriers by railroad, and affecting the interests of an extensive class of their employes.

II.

The Supreme Court of Missouri has erroneously ruled that, where cars are placed by one connecting carrier in a stationary condition upon a track of another connecting carrier, thereby tendering them for transfer to the latter so that the latter connecting carrier may haul them to their ultimate destination, the cars will not be considered to be in use, within the purview of the Safety Appliance Act, by either of such connecting carriers, until the receiving carrier has completed its inspection of, and accepted or rejected, such cars; and even though it be admitted that the equipment of the cars does not comply with the Safety Appliance Act, neither of the connecting carriers will, under such circumstances, be held to have violated the provisions of the act prohibiting any carrier from hauling or using, or permitting to be hauled or used on its lines, any car not equipped as in the act provided, until such car is again placed in motion.

III.

The opinions and decisions of this Court, as well as those of other Federal courts, hold

(a) That, where a railroad car, or similar piece of railroad equipment, is being employed, in connection with other cars or equipment, for the carriage of freight or passengers upon an avenue of interstate commerce, it is in service and use, within the meaning of the Safety Appliance Act;

(b) That a mere temporary interruption of the movement of such car, or similar piece of equipment, with the intention and purpose that its movement be shortly resumed, does not take such car, or similar equipment, out of service or use;

(c) That, for such a car, or similar piece of equipment, to be taken out of service or use, so as to take it out of the purview of the Safety Appliance Act, it must be placed in a repair shop, or upon a dead track, used solely for repair purposes.

Prayer.

For the purpose of correcting the errors complained of, and to the end that the rights of the petitioner may be determined in accordance with Federal law, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of the State of Missouri, commanding it to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and proceedings of the said Supreme Court of Missouri in the within described cause of Thomas J. Brady, respondent, *vs.* Terminal Railroad Association of St. Louis, a corporation, appellant, No. 33,525, to the end that the judgment of said Supreme Court of Missouri in said cause may be reviewed by this Court, as pro-

vided by law, and that your petitioner may have such other relief as to this Court may seem appropriate, and that the judgment of the said Supreme Court of Missouri may be reversed by this Honorable Court.

THOMAS J. BRADY,
Petitioner,
By MARK D. EAGLETON,
Counsel for Petitioner.

MERRITT U. HAYDEN and
ROBERTS P. ELAM,
Of Counsel.

SUPPORTING BRIEF.

I.

The car from which petitioner (plaintiff) fell to his injury was "in service" and "in use" by the respondent Terminal Railroad Association of St. Louis at the time of petitioner's injury. It was but one car in a train of some fifty or sixty cars, all coupled together, in active use in hauling freight, which had been hauled interstate by respondent from St. Louis, Missouri, to Granite City, Illinois, and there placed by respondent upon the Wabash Railway Company's transfer track (sometimes referred to as the "inbound track," "receiving track," and "track No. 11"), for the purpose of tendering the entire train of cars for transfer to, and further hauling by, the Wabash Railway Company. The interstate transportation of the entire train of cars did not end when respondent placed the cars upon the Wabash Railway Company's transfer track, although the cars were not then in motion, such cars not having been delivered to the consignee or consignees. Neither the temporary halt of the train on the Wabash transfer track, nor the inspection incidental to the transfer of the entire train to the Wabash Railway Company, took the train, or the cars therein, out of use. The entire train, and each of the cars therein, was in "use," in the sense in which that word is employed in the Federal Safety Appliance Act.

Act of Cong., March 2, 1903, c. 976, Sec. 1, 32 Stat. 943, U. S. Code, Title 45, Sec. 8;

Act of Cong., April 14, 1910, c. 160, Sec. 2, 36 Stat. 298, U. S. Code, Title 45, Sec. 11;

Chicago, G. W. R. Co. v. *Schendel*, 267 U. S. 287, 45 S. Ct. 303, 69 L. Ed. 614;

Delk v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, 31 S. Ct. 617, 55 L. Ed. 590;

New York Central R. Co. v. *Marcone*, 281 U. S. 345, 50 S. Ct. 294, 74 L. Ed. 892;

Walsh v. *New York, N. H. & H. R. Co.* (Second Employers' Liability Cases), 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327;

Minneapolis, St. P. & S. S. M. R. Co. v. *Goneau*, 269 U. S. 406, 46 S. Ct. 129, 70 L. Ed. 335;

Great Northern R. Co. v. *Otos*, 239 U. S. 349, 36 S. Ct. 124, 60 L. Ed. 322;

Johnson v. *Southern Pacific R. Co.*, 196 U. S. 1, 25 S. Ct. 158, 49 L. Ed. 363;

Erie R. Co. v. *Russell*, 106 C. C. A. 160, 183 Fed. 722 (writ of error dismissed, 220 U. S. 607, 31 S. Ct. 722, 55 L. Ed. 607);

United States v. *St. Louis S. W. R. Co.*, 106 C. C. A. 230, 184 Fed. 28;

2 Roberts' Federal Liability of Carriers, page 1435, Secs. 747, 755;

Baltimore & O. S. W. R. Co. v. *Burtch*, 263 U. S. 540, 44 S. Ct. 165, 68 L. Ed. 433;

St. Louis & S. F. R. Co. v. *Seale*, 229 U. S. 156, 33 S. Ct. 651, 57 L. Ed. 1129;

McNeill v. *Southern Ry. Co.*, 202 U. S. 543, 26 S. Ct. 722, 50 L. Ed. 1142;

Rhodes v. *Iowa*, 170 U. S. 412, 18 S. Ct. 664, 42 L. Ed. 1088.

II.

The fact that the grabiron or handhold on the roof of the car at the top of the side ladder pulled loose, under petitioner's (plaintiff's) weight, when he attempted to use it in the ordinary manner to get onto the top of the car, together with petitioner's description of its condition, sufficiently

shows that it was insecure, within the meaning of Section 11 of the Federal Safety Appliance Act.

Davis v. *Wolfe*, 263 U. S. 239, 44 S. Ct. 64, 68 L. Ed. 284 (Affirming *Wolfe* v. *Payne*, 294 Mo. 170, 241 S. W. 915);

Swinson v. *Chicago, St. P. M. & O. R. Co.*, 294 U. S. 529, 55 S. Ct. 517, 79 L. Ed. 1041;

Didinger v. *Pennsylvania R. Co.*, 39 F. (2d) 798.

III.

The petitioner (plaintiff) having been injured as a proximate result of the failure of the respondent Terminal Railroad Association to comply with a requirement of the provision of Section 11 of the Safety Appliance Act (U. S. Code, Title 45, Sec. 11), he was entitled to recover from respondent for such injuries.

Swinson v. *Chicago, St. P. M. & O. R. Co., supra;*

Fairport, C. & E. R. Co. v. *Meredith*, 292 U. S. 589, 54 S. Ct. 826, 78 L. Ed. 1146;

Davis v. *Wolfe, supra;*

Louisville & N. R. Co. v. *Layton*, 243 U. S. 617, 37 S. Ct. 456, 61 L. Ed. 931.

ARGUMENT.

The Supreme Court of Missouri erred in failing to hold that, upon the undisputed facts, there was a violation by respondent of Section 11 of the Federal Safety Appliance Act, in that respondent used a freight car with an insecure handhold or grabiron on the roof at the top of the ladder, and that plaintiff was entitled to recover damages for his injuries which proximately resulted therefrom.

I.

Section 11 of the Safety Appliance Act, upon which petitioner founded his action in the Missouri courts, is as follows:

> "SEC. 11. *Safety Appliances Required For Each Car—When Hand Brakes May be Omitted*—It shall be unlawful for any common carrier subject to the provisions of this chapter *to haul,* or *permit to be hauled, or used on its lines,* any car subject to the provisions of this chapter not equipped with appliances herein provided for to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, *and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders:* Provided, that in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose" (Apr. 14, 1910, c. 160, Sec. 2, 36 Stat. 298). 45 U. S. C., Sec. 11.

It is significant that throughout the various sections of the Safety Appliance Act there appear specific and pointed provisions against the *use* of cars or trains without the required equipment, as well as against the *hauling* thereof,

as distinctly appears from the appendix to this brief. The particular section in question forbids the carrier to *haul or permit to be hauled or used on its line* any car not equipped with a handhold or grabiron on the roof at the top of the ladders.

In the determination of whether the defective car which resulted in petitioner's (plaintiff's) injury was being "hauled or used" by respondent, it should be recalled that the evidence in this case showed without dispute that this car, together with some fifty or sixty other cars, a short time before had been hauled interstate by the respondent and placed by it upon the transfer track in question for the purpose of tendering all of the cars to the Wabash Railway Company for further transportation. All of these cars were coupled together as a train, and many of them were loaded with freight destined for various points within and without the State of Illinois. The transfer of the train of cars from the respondent to its connecting carrier, the Wabash Railway Company, of necessity required that the train of cars be stopped at the transfer point, that the respondent's motive power be detached therefrom, and that the Wabash Railway Company's motive power be attached thereto. The temporary halt of the train on the Wabash transfer track for these purposes, obviously, did not take the cars out of "service," or out of "use." Such temporary halt was but a necessary step in the progress and transportation of the cars and the freight contained therein.

Incidental to this necessary temporary halting of the cars, it was the custom and practice of the Wabash Railway Company (as is the general custom among railroads), to inspect the cars tendered to it for transfer. Obviously, this incidental act, which was done during the performance of the necessary mechanics of effectuating the transfer of these cars from the respondent to the Wabash, had no

effect upon the character of the cars with reference to their being in "use" or in "service" by the respondent.

This is manifest from the fact that, if these cars were in the course of interstate transportation by the respondent alone, and respondent had brought its train to a stop on a siding for the purpose of inspecting the cars to determine whether they were in condition to proceed on their journey, and with the intention to continue with the interstate transportation of the train as soon as the inspection was completed and in conformity with intelligent, practical railroading, it would not be questioned for a moment that such a train was then in use.

The delay in making the inspection of these cars, until some three hours after they had been placed upon the transfer track by the respondent, also does not change the legal status of the cars with reference to their being in use. If the Wabash Railway Company had had car inspectors and motive power to make the inspection and transfer at the very instant of tender, the cars would still only be serving the purposes of the two railroads involved, namely, the respondent Terminal Railroad Association of St. Louis making the tender and the Wabash Railway Company accepting or rejecting the cars. Practical railroading does not permit railroad companies to have inspectors and motive power available at every instant when cars are sent into its yards by other railroads for transfer. Inspectors and motive power employed for this purpose are busy throughout the hours of the day. They go from one group of cars tendered to them to another group of such cars. The mere fact that they cannot conveniently get to a certain group for two or three hours does not lend color to the statement that the cars in that group, while awaiting the arrival of the inspectors and the motive power, or either, are withdrawn from service or use.

Obviously, then, when the injury to petitioner (plaintiff) occurred, the cars were in active use, in the furtherance of respondent's business and transportation of them, and under the authorities they were in "use" in the sense in which that word is employed in the Safety Appliance Act.

The principles here involved are not new to this Court, although they have never been applied to a state of facts identical with those here involved.

In *Johnson* v. *Southern Pacific R. Co.*, 196 U. S. 1, 25 S. Ct. 158, 49 L. Ed. 363, this Court held that a dining car regularly used in interstate traffic, while waiting on a siding to be picked up and put into the next west-bound passenger train to pass that siding, was being "used in moving interstate traffic," within the meaning of that phrase as employed in the original Safety Appliance Act (March 2, 1893, c. 196, Sec. 2, 27 Stat. 531).

In *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, 31 S. Ct. 617, 55 L. Ed. 590, this Court had before it a case in which a car containing an interstate shipment was found by the railroad company to be defective, and was placed upon a switch track, known as the "dead track," to await repairs. In undertaking to move other cars off this switch track, it became necessary to make a coupling between this car and another, and while attempting so to do, the plaintiff was injured as a result of the defective safety appliances upon the car. The defendant railway company there claimed that the defective car, having been upon the "dead track" awaiting repairs for some twenty-seven or twenty-eight hours previous to the plaintiff's injury, was not "in use" in interstate commerce by the defendant, but had been withdrawn from service. This Court, adopting the language of the Circuit Court of Appeals on a previous hearing, with reference to such contention said (220 U. S. 584 et seq):

> "* * * we are inclined to think otherwise. Its cargo had not yet reached its destination and was not then

> ready for the delivery to the consignee wherewith the commerce would have ended. *Its stoppage in the yard was an incident to the transportation.* * * * After the coupler became defective and could not be coupled without going between the ends of the cars, it became unlawful for the railroad company to haul it, or permit it to be hauled, or used, on its line. It then became the duty of the railroad company to withdraw the car from use, and have it repaired to conform with the law before using it further. It did not do this. * * * The car was defective, liable at any time to cause an accident, and it could not be kept in use at the constant risk of a serious accident, either upon the excuse that it would be inconvenient to withdraw it from service, or that the company had sent for the required appliance, and would repair the car when it should be received. *This is a case peculiarly within the provisions of the (safety appliance) act.*" (Emphasis and parenthetical portion ours.)

In *Chicago G. W. R. Co.* v. *Schendel*, 267 U. S. 287, 45 S. Ct. 303, 69 L. Ed. 614, the facts were that a drawbar had pulled out of a car, and the car was thereupon chained to the car immediately ahead. The train was then pulled onto an adjacent siding and stopped, with the intention of detaching the damaged car and leaving it there to be repaired. After the defective car had been placed stationary upon the siding, and the engine cut off it, the car ran slowly down the gentle grade of the siding, and the chain on the car caught plaintiff's decedent, causing him to suffer fatal injuries. It was contended by the railway company that the case was one not brought within the Safety Appliance Act by the facts, in that the defective car had come to rest on the side track and had ceased to be "used" within the meaning of the Act, at the time plaintiff's decedent was injured This Court, in ruling adversely to such contention, distinctly said (267 U. S. l. c. 219):

> "Under the circumstances disclosed, we think it clear that the use, movement or hauling of the defective car, within the meaning of the statute, had not ended at the time of the accident."

In *New York Central R. Co.* v. *Marcone,* 281 U. S. 345, 50 S. Ct. 294, 74 L. Ed. 892, this Court distinctly held that an engine, used to haul interstate trains, but which had been placed by itself on a track just outside one of the engine stalls of a roundhouse for inspection and greasing, was not withdrawn from use or service, but, on the contrary, was then being employed in interstate transportation or work so closely connected therewith as to be practically a part thereof.

In *Walsh* v. *New York, N. H. & H. R. Co.,* 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327 (one of the Second Employers' Liability Cases), this Court held that a car which had been placed upon a side track for repair, and which was being repaired by plaintiff's intestate at the time of the injury resulting in his death, was not withdrawn from service or use so as to be out of interstate commerce.

To this same general effect are *Great Northern Ry. Co.* v. *Otos,* 239 U. S. 349, 36 S. Ct. 124, 60 L. Ed. 322; *Erie R. Co.* v. *Russell,* 106 C. C. A. 160, 183 Fed. 722 (writ of error dismissed 220 U. S. 607, 31 S. Ct. 722, 55 L. Ed. 607); and *United States* v. *St. Louis, S. W. R. Co.,* 106 C. C. A. 230, 184 Fed. 28.

The foregoing authorities make it clear not only that the respondent Terminal Railroad Association's "use" of the car involved in the instant case had not been terminated prior to plaintiff's injury by the car being placed upon the transfer track, but that the "hauling" of said car by the respondent, within the common meaning of the verb "haul," and the provisions of the Federal Safety Appliance Act, had not been terminated. This car had not, prior to plaintiff's injury, reached its destination and been delivered by respondent to the consignee thereof, so as to terminate its

interstate transportation, and this is true even though the car was merely an empty one being returned to the Wabash Railway Company by the respondent, because the Wabash Railway Company, in such a case, would be the consignee thereof. It is well settled that the transportation of an interstate car is not terminated until it has actually been delivered to the consignee. 2 Roberts' Federal Liability of Carriers, page 1435, Sec. 747, 755; *Baltimore & O. S. W. R. Co.* v. *Burtch*, 263 U. S. 540, 44 S. Ct. 165, 68 L. Ed. 433; *St. Louis & S. F. R. Co.* v. *Seale*, 229 U. S. 156, 33 S. Ct. 651, 57 L. Ed. 1129; *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543, 26 S. Ct. 722, 50 L. Ed. 1142; and *Rhodes* v. *Iowa*, 170 U. S. 412, 18 S. Ct. 664, 42 L. Ed. 1088.

At the time this train of some fifty or sixty cars was placed upon the transfer track by the respondent Terminal Railroad Association of St. Louis, it was the intention of both the respondent and the Wabash Railway Company, and within the immediate contemplation of both, that the cars should be "hauled and used" by the Wabash in order that their transportation might be completed, because, concededly, some of these cars were destined to cities located in States other than Missouri and Illinois (R. 41). Obviously, therefore, the transportation of these cars had not been terminated, but had been delayed temporarily to effectuate a transfer or interchange and an inspection incidental thereto, and that these cars were not withdrawn from service or use.

In the petitioner's case against his employer, the Wabash Railway Company, the Supreme Court of Missouri held that this train of cars was not being "hauled or used" by the Wabash Railway Company in that the Wabash had not accepted them at the time of petitioner's injury (*Brady* v. *Wabash Ry. Co.*, 329 Mo. 1123, 49 S. W. (2d) 24, 27), and that the use, movement or hauling of the cars by the Wabash had not commenced. In its later decision in the

petitioner's case against the respondent Terminal Railroad Association of St. Louis (*Brady* v. *Terminal R. Assn. of St. Louis* (Mo. Sup.), 102 S. W. (2d) 903), which is the proceeding here sought to be reviewed; the Supreme Court of Missouri, basing its decision upon the opinion in petitioner's case against his employer, ruled that the use, movement or hauling of the train of cars by the respondent had terminated prior to petitioner's injury, when respondent placed the train of cars in a stationary condition upon the transfer track. By its two opinions, petitioner respectfully submits that the Supreme Court of Missouri has reached a paradoxical, if not indefensible, result. If that court is right in both of its opinions, then the car upon which petitioner was injured was, at the time of his injury, not being hauled or used by anyone and was not in the service of anyone. And, this would be true not only of the car upon which petitioner was injured, but would also be true of each and every one of the other fifty or sixty cars in the train which had been placed on the transfer track by the respondent. All of these cars were placed there, as a unit, at the same time and for the same purpose. The inspection to be made by the petitioner, or the Wabash Railway Company, applied equally to all cars. The car upon which petitioner was working at the time of his injury was no more withdrawn from service or use than those cars to which it was coupled and attached. Of necessity, the Supreme Court of Missouri had to hold that all of the cars tendered by the respondent Terminal Railroad Association of St. Louis to the Wabash Railway Company, as aforesaid, were withdrawn from service and use, in order to reach the results stated in the two opinions. A mere statement that fifty or sixty cars, which were being transported in interstate commerce and which had not reached their destination, and which had not been bad ordered for any reason or placed upon any bad order or repair track, but which

had definitely been placed upon a general switch track for transfer from one connecting carrier to another, with the intention that they resume their journey upon the completion of the necessary mechanics to effectuate such transfer (including an inspection incidental to such transfer), should suffice to refute a holding that such cars were not in service or use, and should clearly demonstrate the manifest error in the opinions of the Missouri Supreme Court.

The effect of the two opinions of the Missouri Supreme Court is to rule that the question as to whether the cars were in "use," within the meaning of that word as employed in the Safety Appliance Act, is to be determined by whether such cars were in motion or stationary. This is, of course, directly in conflict with the decision in *Minneapolis, St. P. & S. S. M. R. Co.* v. *Goneau,* 269 U. S. 406, 46 S. Ct. 129, 70 L. Ed. 335, wherein this Court said (269 U. S. l. c. 409):

> "The Railway Company contends that the evidence did not bring the case within the Safety Appliance Act or warrant its submission to the jury under that Act; the argument being, in substance, that the defective car, being motionless at the time of the accident, was not then in use; * * *.
>
> "We cannot sustain this contention. Under the circumstances indicated it is clear that the use of the defective car had not ended at the time of the accident, although it was then motionless. * * *"

In the light of the decisions of this Court which we have heretofore referred to, the facts that the transportation of these cars had not been terminated, but had been delayed temporarily to effectuate a transfer or interchange from respondent to the Wabash, and the cars had not yet been accepted by the Wabash, conclusively demonstrate that the cars were still being "hauled" by the respondent Terminal Railroad Association of St. Louis at the time of petitioner's

injury, within the common meaning of the verb "haul," and within the meaning of the Federal Safety Appliance Act, although such cars were not then actually in motion.

Even if the "hauling" of this train of cars by respondent Terminal Railroad Association of St. Louis could be limited to actual movement, and the "hauling" thereof by respondent deemed to have been terminated some three hours previous to petitioner's injury when the respondent placed the cars upon the transfer track, we fail utterly to see how it can be ruled that their "use" by respondent had been so terminated. It should not be overlooked that the verb "use" is a word of extremely broad signification, meaning, generally, "to employ for the accomplishment of a purpose," and is defined in Webster's International Dictionary as "to make use of; to convert to one's service; to avail one's self of; to employ." It is conceded that this entire train of fifty or sixty cars, including the car upon which petitioner was injured, was placed by the respondent Terminal Railroad Association of St. Louis upon the transfer track for the purpose of tendering all of those cars for transfer to, and further transportation by, the Wabash. *Manifestly, therefore, the entire train of cars, and each car in the train, was in use by, and in the service of, the respondent for the purpose of making such tender and effectuating a transfer from the respondent to the Wabash for the further transportation of the cars,* all of which were still, concededly, in respondent's possession while the tender was being made, the cars not having been accepted by the Wabash (R. 38, 39). Manifestly, too, the decision of the Missouri Supreme Court in *Brady* v. *Wabash Ry. Co.*, 329 Mo. 1123, 49 S. W. (2d) 24, to the contrary notwithstanding, these cars were then and there being "used" by the Wabash for the purpose of making an inspection incidental to such tender and the effectuation of such transfer.

What we have heretofore said is not in the least in conflict with the decisions in *Baltimore & O. R. Co.* v. *Hooven*, 297 Fed. 919; *McCalmont* v. *Pennsylvania R. Co.*, 283 Fed. 726; *Sherry* v. *Baltimore & O. R. Co.*, 30 F. (2d) 487, and *New York, etc., R. Co.* v. *Kelly*, 70 F. (2d) 548, which the Supreme Court of Missouri evidently considered as binding and controlling. Suffice it to say that, in each of the cases last cited, the accident occurred *after the cars had been sent to repair shops or placed upon dead tracks used solely for repair purposes.* Typical of those cases is the pronouncement in *New York, etc., R. Co. v. Kelly*, 70 F. (2d) 548, 549, to the effect that

> "It is admitted that the car was undergoing repairs, *on a repair track which was not used for general switching*, and which was locked so as to preclude the entry of cars while repairs were being made . . ." (Emphasis ours.)

The distinction between those cases and the instant case is manifest because, in the instant case, as we have heretofore indicated, the transfer track upon which the cars here involved were placed was not a "dead track," and was not used for repair purposes, but was, as its name implies, on the contrary, *a track used for general switching in the transfer or interchange of cars* between the two connecting carriers, the respondent and the Wabash Railway Company. Furthermore, the cars here in question were not placed upon this track for "repair purposes," but were placed there solely for the purpose of effectuating a transfer or interchange from the respondent to the Wabash so that the transportation of the cars could continue, the inspection by the Wabash being merely incidental to such transfer. The distinction which we here make was clearly made in *Erie R. Co.* v. *Russell*, 106 C. C. A. 160, 183 Fed. 722 (writ of error dismissed 220 U. S. 607, 31 S. Ct. 722, 55 L. Ed. 607).

From the foregoing, we submit that it is manifest that the car upon which petitioner was injured, was, at the time of his injury, being "hauled" or "used" by the respondent Terminal Railroad Association of St. Louis within the meaning of the Federal Safety Appliance Act.

II.

The evidence established conclusively, and without dispute, that the petitioner, on the occasion in question, was using the handhold or grabiron on the roof of the car at the top of the ladder in a normal way, for the purpose for which it was provided. It pulled loose and caused him to fall. Thereafter, it was discovered that it was insecure, due to the decayed condition of the wood through which the bolts extended. The evidence further established that the injury was caused by the insecurity of the handhold or grabiron. Obviously the evidence was sufficient to establish this element of the petitioner's case.

III.

The clearly defined Congressional purpose in the enactment of the original Safety Appliance Act (March 2, 1893, c. 196, 27 Stat. 531), and the amendments thereto, appear in the titles of those enactments which declare them to be acts "to promote the safety of employes and travelers upon railroads," etc. It has been held that such humanitarian purpose of these enactments "should not be frittered away by judicial construction" (*United States v. Chicago, M. & St. P. R. Co.*, 149 Fed. 486, Syllabus 2).

This Court, in the recent case of *Swinson* v. *Chicago, St. Paul, M. & O. R. Co.*, 294 U. S. 529, 531, 55 S. Ct. 517, 79 L. Ed. 1041, 1043, said:

> "The Safety Appliance Act has been liberally construed so as to give a right of recovery *for every in-*

jury the proximate cause of which was a failure to comply with a requirement of the Act.'' (Emphasis ours.)

And, in ruling that the benefits and protections resulting from duties imposed by the Safety Appliance Act are not confined to ''employes and travelers upon railroads,'' but are extended to any person to whose safety the enactment of the act actually contributes, it was held by this Court in *Fairport, C. & E. R. Co.* v. *Meredith,* 292 U. S. 589, 54 S. Ct. 826, 78 L. Ed. 1446, that a traveler on the highway could recover for injury resulting from failure to maintain in usable condition the power brake required by the Safety Appliance Act. Applying these considerations to the present case, it is apparent that the primary purpose of the requirements of the Safety Appliance Act here involved, that each car ''requiring secure running-boards be equipped'' therewith, and that each car having a ladder be equipped with ''secure handholds or grabirons'' on the roof of the car at the top of the ladder, was to provide employes who might, in the course of their duties, be required to go upon the roofs of such cars, with safe and secure appliances so that they could safely ascend to, and descend from, such roofs.

That the petitioner in the instant case was a railroad employe, and that his duties required him to go upon the roof of the car in question, are beyond controversy. Accordingly, petitioner came directly within the general class of persons named in the title and every part of the Safety Appliance Act as being, and intended to be, protected by the provisions of that act, and it became and was the absolute duty of the respondent Terminal Railroad Association of St. Louis to comply with such provisions in order to protect the life and limb of this petitioner.

The mere fact that the petitioner was a car inspector does not take him out of the class of employes protected by, and included within, the provisions of the Safety Appliance Act.

In the first place, there exists in the Safety Appliance Act no provision excluding car inspectors from its benefits.

In the second place, the nature or character of the work being done by the employe is immaterial, for, as this Court said in *Louisville & N. R. Co.* v. *Layton*, 243 U. S. 617, 621, 37 S. Ct. 456, 61 L. Ed. 931, 933:

> "* * * the liability in damages to employes for failure to comply with the law springs from it being made unlawful to use cars not equipped as required—not from the position the employe may be in or the work which he may be doing at the moment when he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable * * * in damages whenever the failure to obey the safety appliance laws is the proximate cause of injury * * *."

To this same general effect are *Davis* v. *Wolfe*, 263 U. S. 239, 44 S. Ct. 64, 68 L. Ed. 284; and *Swinson* v. *Chicago, St. P. M. & O. R. Co.*, 294 U. S. 529, 55 S. Ct. 517, 79 L. Ed. 1041.

In the third place, the nature of the duty imposed by the section of the Safety Appliance Act here involved, and the benefits resulting from its performance, so obviously contribute to the safety of car inspectors that it is hardly probable that Congress could have contemplated that the act would be inapplicable to the promotion of the safety of that particular class of railroad employees. See *Fairport, C. & E. R. Co.* v. *Meredith*, 292 U. S. 589, 54 S. Ct. 826, 78 L. Ed. 1146. We venture that the use of the running-boards and grabirons or handholds on the roofs of cars by car inspectors is, probably, the predominant and majority use of those particular safety appliances. Ordinarily, other classes of trainmen do not have occasion to go upon the roofs of cars,

although they do make extensive use of the lower part of the side ladders in switching operations, and in getting to the brake platforms, which are not on the roofs of the cars. We believe that it is only reasonable to conclude that the promotion of the safety of car inspectors is a result so readily perceivable that it lies directly within the purview of the requirements that secure running-boards and handholds or grabirons be attached to the roofs of cars at the top of the ladders. That car inspectors need the protection of running-boards on the roofs of cars, and handholds or grabirons on the roofs of cars at the tops of the ladders on the cars is, to us, so obvious that it cannot be said that those particular safety appliances were not intended for the protection of that class of railroad employes. The promotion of the safety of persons who were required to go upon the roofs of cars being the purpose of these particular provisions of the statute, it necessarily follows that anyone whose business calls him to be upon the roof of a car has a right to complain if the carrier fails to comply with its statutory duty and such failure results in injury to that person.

Conclusion.

From the foregoing, we submit that it appears clearly from the facts in this case that the car from which petitioner fell was in use by the respondent Terminal Railroad Association of St. Louis at the time of petitioner's injury; that it was not equipped with a secure handhold at the top of the ladder, and that by reason thereof the handhold became detached and caused petitioner to fall and be injured; that petitioner was within the class of persons intended to be, and in fact being, protected by the provisions of the Safety Appliance Act; and that, under the interpretation of that act adopted by this Court, the petitioner's right of recovery upon such showing was complete.

It consequently follows that the Supreme Court of Missouri erred in reversing the judgment secured by this petitioner on the theory that no violation of the Federal Safety Appliance Act by respondent was shown, and that petitioner was not entitled to recover. We, therefore, respectfully submit that this Honorable Court should issue a writ of certiorari in order that such error may be corrected, and in order that the opinion and judgment of the Supreme Court of Missouri may be reversed.

Respectfully submitted,

MARK D. EAGLETON,
Counsel for Petitioner.

MERRITT U. HAYDEN and
ROBERTS P. ELAM,
of Counsel.

APPENDIX.

Federal Safety Appliance Act.

We set out below, for the convenience of the Court in reference, various sections of the Federal Safety Appliance Act as the same appear in the United States Code, parts of which we have emphasized:

"SECTION 1. *Driving-wheel brakes and appliances for operating train-brake system.*—It shall be unlawful for any common carrier engaged in interstate commerce by railroad *to use on its line* any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or *to run any train in such traffic* that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose" (Mar. 2, 1893, c. 196, Sec. 1, 27 Stat. 531). 45 U. S. C., Sec. 1.

"SEC. 2. *Automatic couplers.*—It shall be unlawful for any common carrier engaged in interstate commerce by railroad *to haul or permit to be hauled or used on its line* any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars" (Mar. 2, 1893, c. 196, Sec. 2, 27 Stat. 531). 45 U. S. C., Sec. 2.

"SEC. 3. *Refusal of insufficiently equipped cars from connecting lines.*—When any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section 1 of this chapter, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped

sufficiently, in accordance with the first section of this chapter, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this chapter" (Mar. 2, 1893, c. 196, Sec. 3, 27 Stat. 531). 45 U. S. C., Sec. 3.

"SEC. 4. *Grabirons or handholds for security in coupling and uncoupling cars.*—Until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company *to use* any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars" (Mar. 2, 1893, c. 196, Sec. 4, 27 Stat. 531). 45 U. S. C., Sec. 4.

"SEC. 5. *Standard height of drawbars for freight cars; noncomplying cars excluded from traffic.*—No freight cars, either loaded or unloaded, *shall be used* in interstate traffic which do not comply with the prescribed standard as to height of drawbars" (Mar. 2, 1893, c. 196, Sec. 5, 27 Stat. 531). 45 U. S. C., Sec. 5.

"SEC. 6. *Failure to equip cars as provided; duty of district attorneys and Interstate Commerce Commission; exceptions from operation of provisions.*—Any common carrier engaged in interstate commerce by railroad *using* any locomotive engine, *running* any train, *or hauling or permitting to be hauled or used on its line* any car in violation of any of the preceding provisions of this chapter, shall be liable to a penalty of $100 for each and every such violation, * * *" (Mar. 2, 1893, c. 196, Sec. 6, 27 Stat. 532; Apr. 1, 1896, c. 87, 29 Stat. 85). 45 U. S. C., Sec. 6.

"SEC. 7. *Assumption of risk by employes.*—Any employe of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car or train *in use* contrary to the provision of this chapter shall not be deemed thereby to have assumed the risk thereby occasioned, although continu-

ing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge" (Mar. 2, 1893, c. 196, Sec. 8, 27 Stat. 532). 45 U. S. C., Sec. 7.

"SEC. 8. *Provisions of Chapter Extended.*—The preceding provisions and requirements of this chapter shall be held to apply to common carriers by railroads in the territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make or type; and the provisions and requirements relating to train brakes, automatic couplers, grab irons and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles *used* on any railroad engaged in interstate commerce, and in the territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles *used* in connection therewith, * * *" (Mar. 2, 1903, c. 976, Sec. 1, 32 Stat. 943). 45 U. S. C., Sec. 8.

"SEC. 11. *Safety Appliances Required for Each Car —When Hand Brakes May Be Omitted.*—It shall be unlawful for any common carrier subject to the provisions of this chapter *to haul,* or *permit to be hauled, or used on its line,* any car subject to the provisions of this chapter not equipped with appliances herein provided for, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, *and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders:* Provided, that in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose," (Apr. 14, 1910, c. 160, Sec. 2, 36 Stat. 298). 45 U. S. C., Sec. 11.

"SEC 13. *Penalty for Using Car Not Equipped as Provided—Hauling Car for Repairs Where Equipment*

Becomes Defective—Liability for Death or Injury of Employe—Use of Chains Instead of Drawbars.—Any common carrier subject to this chapter *using, hauling or permitting to be used or hauled on its line,* any car subject to the requirements of this chapter not equipped as provided in this chapter, shall be liable to a penalty of $100 for each and every such violation, to be recovered as provided in section 6 of this chapter: Provided, that where any car shall have been properly equipped, as provided in this chapter, and such equipment shall have become defective or insecure *while such car was being used by such carrier upon its line of railroad,* such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by this section or section 6 of this chapter, if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point; *and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employe caused to such employe by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or where it is not maintained in accordance with the requirements of this chapter;* and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or 'perishable' freight." (Apr. 14, 1910, c. 160, Sec. 4, 36 Stat. 299). 45 U. S. C., Sec. 13.

"Sec. 14. *Liability for Using Car With Defective Equipment, Except as Specified.*—Except that, within the limits specified in the preceding section of this chapter, the movement of a car with defective or insecure equipment may be made without incurring the

penalty provided by the statutes, but shall in all other respects be unlawful, nothing in sections 11, 12 and 13 of this chapter shall be held or construed to relieve any common carrier, the Interstate Commerce Commission or any United States Attorney from any of the provisions, powers, duties, liabilities or requirements heretofore set out in this chapter; and, except as aforesaid, all of such provisions, powers, duties, requirements and liabilities shall apply." (Apr. 14, 1910, c. 160, Sec. 5, 36 Stat. 299.) 45 U. S. C., Sec. 14.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 163

THOMAS J. BRADY, *Petitioner,*

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, A CORPORATION,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF OF THOMAS J. BRADY, PETITIONER.

MARK D. EAGLETON,
Counsel for Petitioner.

MERRITT U. HAYDEN,
ROBERTS P. ELAM,
Of Counsel.

INDEX.

Subject Index.

	Page
Opinion of the court below	1
Jurisdiction	2
Statement of the case	2
The facts	2
The proceedings	5
Opinion of the Missouri Supreme Court	7
Specification of errors	9
Summary of argument	10
Argument	13
Point I	13
II	24
III	24
Conclusion	28

Table of Cases Cited.

Atlantic Coast Line Co. v. *Davis,* 279 U. S. 34, 49 S. Ct. 210, 73 L. Ed. 601	2
Baltimore & O. R. Co. v. *Hooven,* 297 Fed. 919	23
Baltimore & O. S. W. R. Co. v. *Burtch,* 263 U. S. 540, 44 S. Ct. 165, 68 L. Ed. 433	11, 19
Brady v. *Terminal R. R. Association of St. Louis,* 102 S. W. (2d) 903	7, 20
Brady v. *Wabash Ry. Co.,* 287 U. S. 619, 53 S. Ct. 20, 77 L. Ed. 538	5
Brady v. *Wabash Ry. Co.,* 329 Mo. 1123, 49 S. W. (2d) 24	5, 8, 20, 23
Chicago, G. W. R. Co. v. Schendel, 267 U. S. 287, 45 S. Ct. 303, 69 L. Ed. 614	11, 17
Davis v. *Wolfe,* 263 U. S. 239, 44 S. Ct. 64, 68 L. Ed. 284	12, 13, 26
Delk v. *St. Louis & S. F. R. Co.,* 220 U. S. 580, 31 S. Ct. 617, 55 L. Ed. 590	11, 16
Didinger v. *Pennsylvania R. Co.,* 39 F. (2d) 798	12
Erie R. Co. v. *Russell,* 106 C. C. A. 160, 183 Fed. 722	11, 18, 19, 24

Page

Fairport, C. & E. R. Co. v. *Meredith,* 292 U. S. 589, 54 S. Ct. 826, 78 L. Ed. 1146 ..... 13, 25, 27
Great Northern R. Co. v. *Otos,* 239 U. S. 349, 36 S. Ct. 124, 60 L. Ed. 322 ..... 11, 18
Gulf M. & N. R. Co. v. *Wells,* 275 U. S. 455, 48 S. Ct. 151, 72 L. Ed. 370 2
Johnson v. *Southern Pacific R. Co.,* 169 U. S. 1, 25 S. Ct. 158, 49 L. Ed. 363 ..... 11, 16
Louisville & N. R. Co. v. *Layton,* 243 U. S. 617, 37 S. Ct. 456, 61 L. Ed. 931 ..... 13, 26
McCalmont v. *Pennsylvania R. Co.,* 283 Fed. 726 23
McNeill v. *Southern Ry. Co.,* 202 U. S. 543, 26 S. Ct. 722, 50 L. Ed. 1142 ..... 12, 19
Minneapolis, St. P. & S. S. M. R. Co. v. *Goneau,* 269 U. S. 406, 46 S. Ct. 129, 70 L. Ed. 335 ..... 2, 11, 21
New York, etc., R. Co. v. *Kelly,* 70 F. (2d) 548 23
New York Central R. Co. v. *Marcone,* 281 U. S. 345, 50 S. Ct. 294, 74 L. Ed. 892 ..... 11, 18
Rhodes v. *Iowa,* 170 U. S. 412, 18 S. Ct. 664, 42 L. Ed. 1088 ..... 12, 19
Seaboard Air Line R. Co. v. *Horton,* 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062 2
Sherry v. *Baltimore & O. R. Co.,* 30 F. (2d) 487 23
St. Louis & S. F. R. Co. v. *Seale,* 229 U. S. 156, 33 S. Ct. 651, 57 L. Ed. 1129 ..... 11, 19
Swinson v. *Chicago, St. P. M. & O. R. Co.,* 294 U. S. 529, 55 S. Ct. 517, 79 L. Ed. 1041 ..... 12, 25, 26
United States v. *Chicago, M. & St. P. R. Co.,* 139 Fed. 486 25
United States v. *St. Louis S. W. R. Co.,* 106 C. C. A. 230, 184 Fed. 28 ..... 11, 19
Walsh v. *New York, N. H. & H. R. Co.,* 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327 ..... 11, 18
Wolfe v. *Payne,* 294 Mo. 170, 241 S. W. 915 13

STATUTES CITED.

Act of Cong., March 2, 1903, c. 976, Sec. 1, 32 Stat. 943, U. S. Code, Title 45, Sec. 8 11
Federal Employers' Liability Act (45 U. S. C. A., Sections 51-59) 5

Page

Federal Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531, as amended (45 U. S. C. A. 1) 2, 5, 24

Federal Safety Appliance Act (Act of April 14, 1910, c. 160, Section 2, 36 Stat. 298, 45 U. S. C. A., Section 11) 6, 11, 12, 13

Judicial Code, Sec. 237, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 937 (28 U. S. C. A. 344) 2

TEXT BOOK CITED.

2 Roberts' Federal Liability of Carriers, pages 1435, 1446, Secs. 747, 755 ..... 11, 19

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937.

No. 163

THOMAS J. BRADY,

Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, A CORPORATION,

BRIEF OF THOMAS J. BRADY, PETITIONER.

This case is here pending upon writ of certiorari, awarded by this Court on the 8th day of November, 1937, to review a final judgment and opinion of the Supreme Court of Missouri, entered on February 19, 1937 (R. 129-130), and upon which rehearing was entertained (R. 140) but denied on March 24, 1937 (R. 147). The petition for writ of certiorari was filed in this Court on June 22, 1937.

Opinion of the Court Below.

The opinion of the Supreme Court of Missouri, which is here for review, appears at pages 130 to 139, inclusive, of the printed record herein filed, and is reported under the style of "Thomas J. Brady *vs.* Terminal Railroad

Association of St. Louis'' in Volume 102 of the Southwestern Reporter, Second Series, at page 903. The case is not yet reported in the official Missouri reports.

Jurisdiction of This Court.

The action under review having been brought under the Federal Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531, as amended (45 U. S. C. A. Section 1 *et seq.*), the jurisdiction of this Court to review the final judgment of the Supreme Court of Missouri is within Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 937 (28 U. S. C. A. Section 344), permitting this Court to review by certiorari those decisions of the highest courts of the various States wherein a title, right, privilege or immunity is specially set up or claimed under a statute of the United States. Authorities sustaining the jurisdiction are: *Seaboard Air Line R. Co.* v. *Horton,* 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062; *Minneapolis, St. P. & S. S. M. R. Co.* v. *Goneau,* 269 U. S. 406, 46 S. Ct. 129, 70 L. Ed. 335; *Gulf M. & N. R. Co.* v. *Wells,* 275 U. S. 455, 48 S. Ct. 151, 72 L. Ed. 370; *Atlantic Coast Line Co.* v. *Davis,* 279 U. S. 34, 49 S. Ct. 210, 73 L. Ed. 601.

Statement of the Case.

The Facts.

The facts here involved are practically without dispute, and briefly are as follows:

The respondent Terminal Railroad Association of St. Louis, and the Wabash Railway Company, were, and are, connecting common carriers by railroad, engaged in interstate commerce and transportation (R. 61), and having a connection at Granite City, Illinois, by means of a transfer or interchange track, sometimes referred to in the

evidence as "track No. 11," the "inbound track," or the "receiving track" (R. 15-16, 30).

The petitioner was, at the time of his injury, and for about three and one-half years before that time had been, a car inspector employed by the Wabash Railway Company in its yards at Granite City, Illinois, which included the transfer or interchange track above referred to (R. 15-16), it being his duty to inspect cars hauled into that switch yard by other railroads for transfer to the Wabash (R. 15, 53, 54). Petitioner was injured on November 20, 1927, about 9:00 or 9:30 P. M. (R. 15), while engaged in inspecting a "cut" or "drag" consisting of between fifty and sixty cars, and which was upon the transfer or interchange track referred to above (R. 15, 16, 17, 30). These cars had been hauled, coupled together as a unit or train (R. 28), by the respondent Terminal Railroad Association of St. Louis from St. Louis, Missouri, to Granite City, Illinois, a distance of some ten or twelve miles, and placed by the respondent Terminal Railroad Association of St. Louis upon this particular track, some two or three hours before plaintiff's injury (R. 16, 60). The purpose of respondent Terminal Railroad Association of St. Louis in so moving and placing the cut or drag of cars was, concededly, to tender *them to the Wabash Railway Company* for transfer to, and hauling by, the Wabash (R. 4, 5, 61). At the time the inspection was being made, there were no engines or locomotives attached to the cars (R. 16, 28), and the cut or drag of cars had not been broken up before the inspection, the entire cut or drag being left standing there coupled together just as it was brought in by the respondent Terminal Railroad Association of St. Louis (R. 28-29). In the cut or drag were cars which were moving in interstate commerce, cars containing shipments which were being transported in interstate commerce, and

cars which were destined to foreign cities located in states other than the State of Missouri and the State of Illinois (R. 28, 29, 30).

The petitioner and another car inspector, named Rhine, were inspecting the cars in this cut or drag for the purpose of determining whether the cars were to be accepted or rejected by the Wabash (R. 15, 16, 17, 56). If the inspectors found that the equipment was in a good and safe condition to permit a car to continue its journey, and the car contained no defects in its safety appliances, the car would be marked or carded, and if it was not in such condition, the car would be rejected and taken back by the Terminal Railroad Association of St. Louis, respondent here (R. 17, 54, 56).

Petitioner and Rhine had inspected thirty-five or forty of the cars in the cut prior to petitioner's injury (R. 17). In doing this work, they first inspected the car from the ground, and then went up on the roof or top of the car (R. 17). Petitioner was climbing up the side ladder at the corner of one of the cars in this particular cut or drag, and when he attempted to use the handhold or grabiron on the roof of the car at the top of the ladder to raise himself up onto the top of the car, the handhold, and the latitudinal runningboard to which it was attached, pulled loose and caused him to fall backwards to the ground and sustain injuries (R. 17-23, 50-53). The grabiron or handhold was not secure, and the wood of the latitudinal runningboard, to which the grabiron was attached, was old and rotted out (R. 21-22, 53).

Prior to the petitioner's injury, the cars in this cut or drag had not been accepted by the Wabash (R. 28), the cars having just been placed on the track there for tender to the Wabash (R. 4, 5), and the Wabash not having moved the cars, nor done anything in connection therewith, except to detail petitioner and Rhine to inspect them (R. 28-29).

Petitioner first brought suit for his injuries against his employer, the Wabash Railway Company (R. 50), basing his action upon the Federal Employers' Liability Act (45 U. S. C. A. Sections 51-59) and the Safety Appliance Act (45 U. S. C. A. Sections 1 *et seq.*). He recovered a verdict and judgment in the trial court. That judgment was reversed, on appeal, by the Supreme Court of Missouri (see *Brady* v. *Wabash Railway Co.*, 329 Mo. 1123, 49 S. W. (2d) 24), that court assigning, as its reason for such reversal, that petitioner had failed to make a submissible case against his employer, the Wabash Railway Company, under the Safety Appliance Act, in that the car from which petitioner fell to his injury, although concededly not equipped with a secure grabiron or handhold as required by that act, had not yet been accepted by the Wabash Railway Company, and that that company had not, therefore, "hauled or used" such defective car, nor permitted it to be "hauled or used upon its lines," within the prohibition of the Safety Appliance Act, notwithstanding that the Terminal Railroad Association of St. Louis had hauled the cut or drag of cars a distance of some two miles over the Wabash Railway Company's transfer or interchange track. This court denied certiorari to review that decision of the Missouri Supreme Court (see *Brady* v. *Wabash Railway Co.*, 287 U. S. 619, 53 S. Ct. 20, 77 L. Ed. 538).

The Proceedings.

Following the adverse outcome of his action against his employer as aforesaid, on June 14, 1935 (R. 7) petitioner proceeded with the prosecution of the action which he had meanwhile, on August 17, 1929, instituted in the Circuit Court of the City of St. Louis, Missouri, against the Terminal Railroad Association of St. Louis, the delivering carrier which had tendered to petitioner's employer a car

not equipped with secure grabiron or handhold as required by Section 11 of the Federal Safety Appliance Act (Act of April 14, 1910, c. 160, Section 2; 36 Stat. 298; 45 U. S. C. A. Section 11).

Petitioner's action in the trial court was tried upon a third amended petition (R. 1-4), which alleged that petitioner, his employer the Wabash Railway Company, and the Terminal Railroad Association of St. Louis, were engaged in interstate transportation at the time in question; that petitioner, in the performance of his duties as a car inspector for the Wabash Railway Company, was required to go upon and inspect the cars of a certain interstate freight train to determine whether or not such cars were to be accepted or rejected by the Wabash; that said cars were destined in interstate commerce, having interstate freight therein, and to be further moved in interstate commerce; that, in order to climb upon one of said cars, petitioner used a ladder and grabiron or handhold that was then and there upon said car; that immediately prior to said time, said freight car was hauled and moved by the Terminal Railroad Association of St. Louis and tendered by said Terminal Railroad Association of St. Louis to the Wabash Railway Company, equipped with an insecure grabiron or handhold on the roof of said car; that when petitioner, Thomas J. Brady, took hold of said grabiron, said grabiron became detached from said car, causing petitioner to fall to the ground below, to his injury; that petitioner's said injury occurred as a result of a violation by the Terminal Railroad Association of St. Louis of the Laws of the United States (Act of April 14, 1910, c. 160, Section 2; 36 Stat. 298; 45 U. S. C. A. Section 11), which required that all cars having ladders be equipped also with secure handholds or grabirons on their roofs at the top of said ladders (R. 1-2).

The answer of the Terminal Railroad Association of St.

Louis to the aforesaid third amended petition (R. 4-5) pleaded a general denial; further, that on the occasion mentioned in plaintiff's third amended petition, plaintiff was engaged in his duties as a car inspector, with respect to cars tendered to the Wabash Railway Company by the Terminal Railroad Association of St. Louis, to determine by inspection whether or not cars so tendered were defective as to safety appliances or otherwise, and that as such inspector inspecting cars so tendered to said Wabash Railway Company by the Terminal Railroad Association of St. Louis, plaintiff (petitioner here) was not within the class of persons for whose benefit the Safety Appliance Act was enacted; further, that the risk of the injury sustained by plaintiff (this petitioner) was a necessary incident to his employment as a car inspector by the Wabash; and, further, that plaintiff (this petitioner) was guilty of contributory negligence in grabbing a handhold or grabiron on a car without first testing and trying said handhold or grabiron to determine whether or not it was secure.

The reply of the plaintiff (petitioner here) to the answer (R. 5) was by way of general denial.

Trial was had before the court and a jury and resulted in a verdict and judgment in favor of the petitioner in the sum of fifteen thousand dollars ($15,000.00) (R. 6). An appeal was duly perfected to the Supreme Court of Missouri (R. 7, 113-114), where the judgment was, on February 19, 1937, reversed (R. 129-130), for reasons stated in its opinion (R. 130-139, see, also, *Brady* v. *Terminal Railroad Association of St. Louis* (Mo. Sup.), 102 S. W. (2d) 903).

Thereafter, the proceedings were as hereinbefore set out.

Opinion of the Missouri Supreme Court.

The Missouri Supreme Court, in the course of its opinion (R. 130-139), referred to its earlier opinion in the case of

Brady v. *Wabash Railway Co.*, 329 Mo. 1123, 49 S. W. (2d) 24, and said (R. 133):

> "We determined in plaintiff's former case, *supra*, as the crucial point therein as it is herein, that the Wabash was not 'using' the defective car 'on its line' at the time and place of plaintiff's injury; that is, not using it in the legal sense of the term * * *."

After citing several cases in support of its conclusions, the court continued (R. 133-134):

> "Under those authorities, and for like reasons as in the former case, we now conclude that neither was the Terminal so using or permitting it to be used on its line at that time and place.
>
> "As was stated in the former case 'The statutory criterion is whether the car is "in use" "on its line" within the true purpose and scope of the act.' This car was not; it had temporarily been withdrawn from use. * * * The temporary withdrawal of the car for inspection and to be further kept out of use if its condition so required, had been completed, so far as the Terminal was concerned, before the injury."

It is thus seen that the judgment of the trial court in favor of this petitioner was reversed mainly, if not solely, upon the ground that the car which petitioner was inspecting at the time of his injury was not then being "hauled" or "used" by the Terminal Railroad Association of St. Louis, and that it had been temporarily "withdrawn from use," so as to be not within the prohibition of the Federal Safety Appliance Act.

In this connection, the Supreme Court of Missouri, in its opinion here under review, as well as in its earlier opinion in *Brady* v. *Wabash Railway Company*, 329 Mo. 1123, 49 S. W. (2d) 24 (which is the foundation for the opinion here under review), makes a distinction between the word

"use," as employed in the Federal Safety Appliance Act, and "actual use." The opinions of that court hold that the car in question, although it was shown without dispute to be defective in that it did not have a secure grabiron or handhold such as was required by the Safety Appliance Act, and although it was shown without dispute to be in use by the respondent Terminal Railroad Association for the purpose of making a tender for transfer to the Wabash Railway Company, and in use by the Wabash for the purpose of being inspected to determine whether it would be accepted or rejected, was not "in use" by either of those connecting railroads within the meaning of, and in violation of, the Safety Appliance Act.

Specification of Errors.

The judgment secured by petitioner in the trial court was reversed, and determined against petitioner, by the Supreme Court of Missouri under an erroneous interpretation of the Federal Safety Appliance Act as applied to the facts in this case, in the following particulars:

1. Error in failing and refusing to hold that the train which was being inspected by petitioner, and the cars therein, were in use by the Terminal Railroad Association of St. Louis, in the sense in which that word is employed in the Federal Safety Appliance Act, and in failing and refusing to hold that such use of the train and car in question, with the grabiron or handhold in an insecure condition, constituted a violation of that act.

2. Error in holding that petitioner failed to make a case showing liability of the Terminal Railroad Association of St. Louis under the Federal Safety Appliance Act.

3. Error in holding that the trial court erred in not directing a verdict in favor of the Terminal Railroad Association of St. Louis.

4. Error in holding that the cars of the train, containing shipments then being transported in interstate commerce, which cars had been hauled by the Terminal Railroad Association of St. Louis and placed by it upon the transfer or interchange track of the Wabash Railway Company, a connecting carrier, and there left standing so as to be tendered to the Wabash for further transportation, were not in use, within the meaning of the Federal Safety Appliance Act.

Summary of Argument.

The opinion and decision of the Missouri Supreme Court, complained of, is erroneous for the following reasons:

I.

The car from which petitioner (plaintiff) fell to his injury was but one of some fifty or sixty cars coupled together as a train, which train was in active use in hauling interstate freight, was hauled interstate by the Terminal Railroad Association of St. Louis from St. Louis, Missouri, to Granite City, Illinois, and there was placed by the Terminal Railroad Association of St. Louis upon the Wabash Railway Company's transfer track (sometimes referred to as the "inbound track," "receiving track," and "track No. 11"), for the purpose of tendering the entire train of cars for transfer to, and further hauling by, the Wabash Railway Company. The entire train, and each of the cars therein, was in "use," by the Terminal Railroad Association of St. Louis at the time of petitioner's injury, in the sense in which that word is employed in the Federal Safety Appliance Act, because:

(A) The interstate transportation of the entire train of cars did not end when the Terminal Railroad Association of St. Louis placed the cars upon the Wabash Railway Company's transfer track, although the cars were not then in

motion, such cars not having been delivered to the consignee or consignees. The stoppage of the cars for transfer from one connecting carrier to another was but an incident to their transportation.

Act of Cong., March 2, 1903, c. 976, Sec. 1., 32 Stat. 943, U. S. Code, Title 45, Sec. 8;

Act of Cong., April 14, 1910, c. 160, Sec. 2, 36 Stat. 298, U. S. Code, Title 45, Sec. 11;

Chicago, G. W. R. Co. v. *Schendel,* 267 U. S. 287, 45 S. Ct. 303, 69 L. Ed. 614;

Delk v. *St. Louis & S. F. R. Co.,* 220 U. S. 580, 31 S. Ct. 617, 55 L. Ed. 590;

New York Central R. Co. v. *Marcone,* 281 U. S. 345, 50 S. Ct. 294, 74 L. Ed. 892;

Walsh v. *New York, N. H. & H. R. Co.* (Second Employers' Liability Cases), 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327;

Minneapolis, St. P. & S. S. M. R. Co. v. *Goneau,* 269 U. S. 406, 46 S. Ct. 129, 70 L. Ed. 335;

Great Northern R. Co. v. *Otos,* 239 U. S. 349, 36 S. Ct. 124, 60 L. Ed. 322;

Johnson v. *Southern Pacific R. Co.,* 169 U. S. 1, 25 S. Ct. 158, 49 L. Ed. 363;

Erie R. Co. v. *Russell,* 106 C. C. A. 160, 183 Fed. 722 (writ of error dismissed, 220 U. S. 607, 31 S. Ct. 722, 55 L. Ed. 607);

United States v. *St. Louis S. W. R. Co.,* 106 C. C. A. 230, 184 Fed. 28;

2 Roberts' Federal Liability of Carriers, pages 1435, 1446, Secs. 747, 755;

Baltimore & O. S. W. R. Co. v. *Burtch,* 263 U. S. 540, 44 S. Ct. 165, 68 L. Ed. 433;

St. Louis & S. F. R. Co. v. *Seale,* 229 U. S. 156, 33 S. Ct. 651, 57 L. Ed. 1129;

McNeill v. *Southern Ry. Co.*, 202 U. S. 543, 26 S. Ct. 722, 50 L. Ed. 1142;

Rhodes v. *Iowa*, 170 U. S. 412, 18 S. Ct. 664, 42 L. Ed. 1088.

(B) Neither the temporary halt of the train on the Wabash transfer track, nor the inspection incidental to the transfer of the entire train of cars to the Wabash Railway Company, took the train, or the cars therein, out of service or use.

Authorities cited, *supra*.

II.

The fact that the grabiron or handhold on the roof of the car at the top of the side ladder pulled loose, under petitioner's (plaintiff's) weight, when he attempted to use it in the ordinary manner to get onto the top of the car, together with petitioner's description of its condition, sufficiently shows that it was insecure, within the meaning of Section 11 of the Federal Safety Appliance Act.

Davis v. *Wolfe*, 263 U. S. 239, 44 S. Ct. 64, 68 L. Ed. 284 (Affirming *Wolfe* v. *Payne*, 294 Mo. 170, 241 S. W. 915);

Swinson v. *Chicago, St. P. M. & O. R. Co.*, 294 U. S. 529, 55 S. Ct. 517, 79 L. Ed. 1041;

Didinger v. *Pennsylvania R. Co.*, 39 F. (2d) 798.

III.

The petitioner (plaintiff) having been injured as a proximate result of the failure of the respondent Terminal Railroad Association to comply with a requirement of the provision of Section 11 of the Safety Appliance Act (U. S.

Code, Title 45, Sec. 11), he was entitled to recover from respondent for such injuries.

Swinson v. *Chicago, St. P. M. & O. R. Co., supra;*

Fairport, C. & E. R. Co. v. *Meredith,* 292 U. S. 589, 54 S. Ct. 826, 78 L. Ed. 1146;

Davis v. *Wolfe,* 263 U. S. 239, 44 S. Ct. 64, 68 L. Ed. 284 (Affirming *Wolfe* v. *Payne,* 294 Mo. 170, 241 S. W. 915);

Louisville & N. R. Co. v. *Layton,* 243 U. S. 617, 37 S. Ct. 456, 61 L. Ed. 931.

Argument.

The Supreme Court of Missouri erred in failing to hold that, upon the undisputed facts, there was a violation by the Terminal Railroad Association of St. Louis of Section 11 of the Federal Safety Appliance Act, in that said Terminal Railroad Association used a freight car with an insecure handhold or grabiron on the roof at the top of the ladder, and that plaintiff was entitled to recover damages from said Terminal Railroad Association for his injuries which proximately resulted therefrom.

I.

Section 11 of the Safety Appliance Act, upon which petitioner founded his action in the Missouri courts, is as follows:

"SEC. 11. *Safety Appliances Required For Each Car —When Hand Brakes May be Omitted*—It shall be unlawful for any common carrier subject to the provisions of this chapter to *haul,* or *permit to be hauled, or used on its lines,* any car subject to the provisions of this chapter not equipped with appliances herein provided for to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped

with such ladders and running boards, *and all cars having ladders shall also be equipped with secure handholds or grabirons on their roofs at the tops of such ladders:* Provided, that in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose" (Apr. 14, 1910, c. 160, Sec. 2, 36 Stat. 298). 45 U. S. C., Sec. 11.

It is significant that throughout the various sections of the Safety Appliance Act there appear specific and pointed provisions against the *use* of cars or trains without the required equipment, as well as against the *hauling* thereof, as distinctly appears from the appendix to this brief. The particular section in question forbids the carrier to *haul or permit to be hauled or used on its line* any car not equipped with a handhold or grabiron on the roof at the top of the ladders.

In the determination of whether the defective car which resulted in petitioner's (plaintiff's) injury was being "hauled or used" by respondent (defendant), it should be recalled that the evidence in this case showed without dispute that this car, together with some fifty or sixty other cars, a short time before had been hauled interstate by the respondent and placed by it upon the transfer track in question for the purpose of tendering all of the cars to the Wabash Railway Company for further transportation. All of these cars were coupled together as a train, and many of them were loaded with freight destined for various points within and without the State of Illinois. The transfer of the train of cars from the respondent to its connecting carrier, the Wabash Railway Company, of necessity required that the train of cars be stopped at the transfer point, that the respondent's motive power be detached therefrom, and that the Wabash Railway Company's motive power be attached thereto. The temporary halt of the train on the Wabash

transfer track for these purposes, obviously, did not take the cars out of "service," or out of "use." Such temporary halt was but a necessary step in the progress and transportation of the cars and the freight contained therein.

Incidental to this necessary temporary halting of the cars, it was the custom and practice of the Wabash Railway Company (as is the general custom among railroads), to inspect the cars tendered to it for transfer. Obviously, this incidental act, which was done during the performance of the necessary mechanics of effectuating the transfer of these cars from the respondent to the Wabash, had no effect upon the character of the cars with reference to their being in "use" or in "service" by the respondent.

This is manifest from the fact that, if these cars were in the course of interstate transportation by the respondent alone, and respondent had brought its train to a stop on a siding for the purpose of changing locomotives on the train and inspecting the cars to determine whether they were in condition to proceed on their journey, or for the purpose of such an inspection alone, and with the intention to continue with the interstate transportation of the train as soon as the change of locomotives and inspection, or such inspection alone, was completed in conformity with intelligent, practical railroading, it would not be questioned for a moment that such a train was then in use.

The delay in making the inspection of these cars, until some three hours after they had been placed upon the transfer track by the respondent, also does not change the legal status of the cars with reference to their being in use. If the Wabash Railway Company had had car inspectors and motive power to make the inspection and transfer at the very instant of tender, the cars would still only be serving the purposes of the two railroads involved, namely, the respondent Terminal Railroad Association of St. Louis making the tender, and the Wabash Railway Company accepting or

rejecting the cars. Practical railroading does not permit railroad companies to have inspectors and motive power available at every instant when cars are sent into its yards by other railroads for transfer. Inspectors and motive power employed for this purpose are busy throughout the hours of the day. They go from one group of cars tendered to them to another group of such cars. The mere fact that they cannot conveniently get to a certain group for two or three hours does not lend color to the statement that the cars in that group, while awaiting the arrival of the inspectors and the motive power, or either, are withdrawn from service or use.

Obviously, then, when the injury to petitioner (plaintiff) occurred, the cars were in active use, in the furtherance of respondent's business and transportation of them, and under the authorities they were in "use" in the sense in which that word is employed in the Safety Appliance Act.

The principles here involved are not new to this Court, although they have never been applied to a state of facts identical with those here involved.

In *Johnson* v. *Southern Pacific R. Co.*, 196 U. S. 1., 25 S. Ct. 158, 49 L. Ed. 363, this Court held that a dining car regularly used in interstate traffic, while waiting on a siding to be picked up and put into the next west-bound passenger train to pass that siding, was being "used in moving interstate traffic," within the meaning of that phrase as employed in the original Safety Appliance Act (March 2, 1893, c. 196, Sec. 2, 27 Stat. 531).

In *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, 31 S. Ct. 617, 55 L. Ed. 590, this Court had before it a case in which a car containing an interstate shipment was found by the railroad company to be defective, and was placed upon a switch track, known as the "dead track," to await repairs. In undertaking to move other cars off this switch track, it became necessary to make a coupling between this car and

another, and while attempting so to do, the plaintiff was injured as a result of the defective safety appliances upon the car. The defendant railway company there claimed that the defective car, having been upon the "dead track" awaiting repairs for some twenty-seven or twenty-eight hours previous to the plaintiff's injury, was not "in use" in interstate commerce by the defendant, but had been withdrawn from service. This Court, adopting the language of the Circuit Court of Appeals on a previous hearing, with reference to such contention said (220 U. S. 584 et seq.):

> "* * * we are inclined to think otherwise. Its cargo had not yet reached its destination and was not then ready for the delivery to the consignee wherewith the commerce would have ended. *Its stoppage in the yard was an incident to the transportation.* * * * After the coupler became defective and could not be coupled without going between the ends of the cars, it became unlawful for the railroad company to haul it, or permit it to be hauled, or used, on its line. It then became the duty of the railroad company to withdraw the car from use, and have it repaired to conform with the law before using it further. It did not do this. * * * The car was defective, liable at any time to cause an accident, and it could not be kept in use at the constant risk of a serious accident, either upon the excuse that it would be inconvenient to withdraw it from service, or that the company had sent for the required appliance, and would repair the car when it should be received. *This is a case peculiarly within the provisions of the* (*safety appliance*) act." (Emphasis and parenthetical portion ours.)

In *Chicago G. W. R. Co.* v. *Schendel,* 267 U. S. 287, 45 S. Ct. 303, 69 L. Ed. 614, the facts were that a drawbar had pulled out of a car, and the car was thereupon chained to the car immediately ahead. The train was then pulled onto an adjacent siding and stopped, with the intention of detaching

the damaged car and leaving it there to be repaired. After the defective car had been placed stationary upon the siding, and the engine cut off it, the car ran slowly down the gentle grade of the siding, and the chain on the car caught plaintiff's decedent, causing him to suffer fatal injuries. It was contended by the railroad company that the case was one not brought within the Safety Appliance Act by the facts, in that the defective car had come to rest on the side track and had ceased to be "used" within the meaning of the Act, at the time plaintiff's decedent was injured. This Court, in ruling adversely to such contention, distinctly said (267 U. S. l. c. 219):

> "Under the circumstances disclosed, we think it clear that the use, movement or hauling of the defective car, within the meaning of the statute, had not ended at the time of the accident."

In *New York Central R. Co.* v. *Marcone,* 281 U. S. 345, 50 S. Ct. 294, 74 L. Ed. 892, this Court distinctly held that an engine, used to haul interstate trains, but which had been placed by itself on a track just outside one of the engine stalls of a roundhouse for inspection and greasing, was not withdrawn from use or service, but, on the contrary, was then being employed in interstate transportation or work so closely connected therewith as to be practically a part thereof.

In *Walsh* v. *New York, N. H. & H. R. Co.,* 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327 (one of the Second Employers' Liability Cases), this Court held that a car which had been placed upon a side track for repair, and which was being repaired by plaintiff's intestate at the time of the injury resulting in his death, was not withdrawn from service or use so as to be out of interstate commerce.

To this same general effect are *Great Northern Ry. Co.* v. *Otos,* 239 U. S. 349, 36 S. Ct. 124, 60 L. Ed. 322; *Erie R. Co.* v.

Russell, 106 C. C. A. 160, 183 Fed. 722 (writ of error dismissed 220 U. S. 607, 31 S. Ct. 722, 55 L. Ed. 607); and *United States* v. *St. Louis S. W. R. Co.,* 106 C. C. A. 230, 184 Fed. 28.

The foregoing authorities make it clear not only that the respondent Terminal Railroad Association's "use" of the car involved in the instant case had not been terminated prior to plaintiff's injury by the car being placed upon the transfer track, but that the "hauling" of said car by the respondent, within the common meaning of the verb "haul," and the provisions of the Federal Safety Appliance Act, had not been terminated. This car had not, prior to plaintiff's injury, reached its destination, and been delivered by respondent to the consignee thereof, so as to terminate its interstate transportation. It is well settled that the transportation of an interstate car is not terminated until it has actually been delivered to the consignee. 2 Roberts' Federal Liability of Carriers, pages 1435, 1446, Secs. 747, 755; *Baltimore & O. S. W. R. Co.* v. *Burtch,* 263 U. S. 540, 44 S. Ct. 165, 68 L. Ed. 433; *St. Louis & S. F. R. Co.* v. *Seale,* 229 U. S. 156, 33 S. Ct. 651, 57 L. Ed. 1129; *McNeill* v. *Southern Ry. Co.,* 202 U. S. 543, 26 S. Ct. 722, 50 L. Ed. 1142; and *Rhodes* v. *Iowa,* 170 U. S. 412, 18 S. Ct. 664, 42 L. Ed. 1088.

At the time this train of some fifty or sixty cars was placed upon the transfer track by the respondent Terminal Railroad Association of St. Louis, it was the intention of both the respondent and the Wabash Railway Company, and within the immediate contemplation of both, that the cars should be "hauled and used" by the Wabash in order that their transportation might be completed, because, concededly, some of these cars were destined to cities located in States other than Missouri and Illinois (R. 30). Obviously, therefore, the transportation of these cars had not been terminated, but had been delayed temporarily to effectuate a transfer or interchange and an inspection incidental thereto, and these cars were not withdrawn from service or use.

In the petitioner's case against his employer, the Wabash Railway Company, the Supreme Court of Missouri held that this train of cars was not being "hauled or used" by the Wabash Railway Company in that Wabash had not accepted them at the time of petitioner's injury. (*Brady* v. *Wabash Ry. Co.*, 329 Mo. 1123, 49 S. W. (2d) 24, 27), and that the use, movement or hauling of the cars by the Wabash had not commenced. In its later decision in the petitioner's case against the respondent Terminal Railroad Association of St. Louis (*Brady* v. *Terminal R. Assn. of St. Louis* (Mo. Sup.), 102 S. W. (2d) 903), which is the proceeding here being reviewed, the Supreme Court of Missouri, basing its decision upon the opinion in petitioner's earlier case against his employer, ruled that the use, movement or hauling of the train of cars by the respondent had terminated prior to petitioner's injury, when respondent placed the train of cars in a stationary condition upon the transfer track. By its two opinions, petitioner respectfully submits that the Supreme Court of Missouri has reached a paradoxical, if not indefensible, result. If that court is right in both of its opinions, then the car upon which petitioner was injured was, at the time of his injury, not being hauled or used by anyone and was not in the service of anyone. And, this would be true not only of the car upon which petitioner was injured, but would also be true of each and every one of the other fifty or sixty cars in the train which had been placed on the transfer track by the respondent. All of these cars were placed there, as a unit, at the same time and for the same purpose. The inspection to be made by the petitioner, or the Wabash Railway Company, applied equally to all cars. The car upon which petitioner was working at the time of his injury was no more withdrawn from service or use than those cars to which it was coupled and attached. Of necessity, the Supreme Court of Missouri had to hold that all of

the cars tendered by the respondent Terminal Railroad Association of St. Louis to the Wabash Railway Company, as aforesaid, were withdrawn from service and use, in order to reach the results stated in the two opinions. A mere statement that fifty or sixty cars, which were being transported in interstate commerce and which had not reached their destination, and which had not been bad ordered for any reason or placed upon any bad order or repair track, but which had definitely been placed upon a general switch track for transfer from one connecting carrier to another, with the intention that they resume their journey upon the completion of the necessary mechanics to effectuate such transfer (including an inspection incidental to such transfer), should suffice to refute a holding that such cars were not in service or use, and should clearly demonstrate the manifest error in the opinions of the Missouri Supreme Court.

The effect of the two opinions of the Missouri Supreme Court is to rule that the question as to whether the cars were in "use," within the meaning of that word as employed in the Safety Appliance Act, is to be determined by whether such cars were in motion or stationary. This is, of course, directly in conflict with the decision in *Minneapolis, St. P. & S. S. M. R. Co.* v. *Goneau,* 269 U. S. 406, 46 S. Ct. 129, 70 L. Ed. 335, wherein this Court said (269 U. S. l. c. 409):

> "The Railway Company contends that the evidence did not bring the case within the Safety Appliance Act or warrant its submission to the jury under that Act; the argument being, in substance, that the defective car, being motionless at the time of the accident, was not then in use; * * *
>
> "We cannot sustain this contention. Under the circumstances indicated it is clear that the use of the defective car had not ended at the time of the accident, although it was then motionless. * * *"

In the light of the decisions of this Court which we have heretofore referred to, the facts that the transportation of these cars had not been terminated, but had been delayed temporarily to effectuate a transfer or interchange from respondent to the Wabash, and the cars had not yet been accepted by the Wabash, conclusively demonstrate that the cars were still being "hauled" by the respondent Terminal Railroad Association of St. Louis at the time of petitioner's injury, within the common meaning of the verb "haul," and within the meaning of the Federal Safety Appliance Act, although such cars were not then actually in motion.

Even if the "hauling" of this train of cars by respondent Terminal Railroad Association of St. Louis could be limited to actual movement, and the "hauling" thereof by respondent deemed to have been terminated some three hours previous to petitioner's injury when the respondent placed the cars upon the transfer track, we fail utterly to see how it can be ruled that their "use" by respondent had been so terminated. It should not be overlooked that the verb "use" is a word of extremely broad signification, meaning, generally, "to employ for the accomplishment of a purpose," and is defined in Webster's International Dictionary as "to make use of; to convert to one's service; to avail one's self of; to employ." It is conceded that this entire train of fifty or sixty cars, including the car upon which petitioner was injured, was placed by the respondent Terminal Railroad Association of St. Louis upon the transfer track for the purpose of tendering all of those cars for transfer to, and further transportation by, the Wabash. *Manifestly, therefore, the entire train of cars, and each car in the train, was in use by, and in the service of, the respondent for the purpose of making such tender and effectuating a transfer from the respondent to the Wabash for the further transportation of the cars,* all of which were still, concededly, in respondent's possession while the tender was

being made, the cars not having been accepted by the Wabash (R. 28). Manifestly, too, the decision of the Missouri Supreme Court in *Brady* v. *Wabash Ry. Co.*, 329 Mo. 1123, 49 S. W. (2d) 24, to the contrary notwithstanding, these cars were then and there being "used" by the Wabash for the purpose of making an inspection incidental to such tender and the effectuation of such transfer.

What we have heretofore said is not in the least in conflict with the decisions in *Baltimore & O. R. Co.* v. *Hooven*, 297 Fed. 919; *McCalmont* v. *Pennsylvania R. Co.*, 283 Fed. 726; *Sherry* v. *Baltimore & O. R. Co.*, 30 F. (2d) 487, and *New York, etc. R. Co.* v. *Kelly*, 70 F. (2d) 548, which the Supreme Court of Missouri evidently considered as binding and controlling. Suffice it to say that, in each of the cases last cited, the accident occurred *after the cars had been sent to repair shops or placed upon dead tracks used solely for repair purposes.* Typical of those cases is the pronouncement in *New York, etc., R. Co.* v. *Kelly*, 70 F. (2d) 548, 549, to the effect that

> "It is admitted that the car was undergoing repairs, *on a repair track which was not used for general switching*, and which was locked so as to preclude the entry of cars while repairs were being made * * *." (Emphasis ours.)

The distinction between those cars and the instant case is manifest because, in the instant case, as we have heretofore indicated, the transfer track upon which the cars here involved were placed was not a "dead track," and was not used for repair purposes, but was, as its name implies, on the contrary, *a track used for general switching in the transfer or interchange of cars* between the two connecting carriers, the respondent and the Wabash Railway Company. Furthermore, the cars here in question were not placed upon this track for "repair purposes,"

but were placed there solely for the purpose of effectuating a transfer or interchange from the respondent to the Wabash so that the transportation of the cars could continue, the inspection by the Wabash being merely incidental to such transfer. The distinction which we here make was clearly made in *Erie R. Co.* v. *Russell*, 106 C. C. A. 160, 183 Fed. 722 (writ of error dismissed 220 U. S. 607, 31 S. Ct. 722, 55 L. Ed. 607).

From the foregoing, we submit that it is manifest that the car upon which petitioner was injured, was, at the time of his injury, being "hauled" or "used" by the respondent Terminal Railroad Association of St. Louis within the meaning of the Federal Safety Appliance Act.

II.

The evidence established conclusively, and without dispute, that the petitioner, on the occasion in question, was using the handhold or grabiron on the roof of the car at the top of the ladder in a normal way, for the purpose for which it was provided. It pulled loose and caused him to fall. Thereafter, it was discovered that it was insecure, due to the decayed condition of the wood through which the bolts extended. The evidence further established that the injury was caused by the insecurity of the handhold or grabiron. Obviously the evidence was sufficient to establish this element of the petitioner's case.

III.

The clearly defined Congressional purpose in the enactment of the original Safety Appliance Act (March 2, 1893, c. 196, 27 Stat. 531), and the amendments thereto, appear in the titles of those enactments which declare them to be acts "to promote the safety of employes and travelers upon railroads," etc. It has been held that such humanitarian

purpose of these enactments "should not be frittered away by judicial construction" (*United States* v. *Chicago, M. & St. P. R. Co.*, 149 Fed. 486, Syllabus 2).

This Court, in the recent case of *Swinson* v. *Chicago, St. Paul, M. & O. R. Co.*, 294 U. S. 529, 531, 55 S. Ct. 517, 79 L. Ed. 1041, 1043, said:

> "The Safety Appliance Act has been liberally construed so as to give a right of recovery *for every injury the proximate cause of which was a failure to comply with a requirement of the act.*" (Emphasis ours.)

And, in ruling that the benefits and protections resulting from duties imposed by the Safety Appliance Act are not confined to "employes and travelers upon railroads," but are extended to any person to whose safety the enactment of the act actually contributes, it was held by this Court in *Fairport, C. & E. R. Co.* v. *Meredith*, 292 U. S. 589, 54 S. Ct. 826, 78 L. Ed. 1446, that a traveler on the highway could recover for injury resulting from failure to maintain in usable condition the power brakes required by the Safety Appliance Act. Applying these considerations to the present case, it is apparent that the primary purpose of the requirements of the Safety Appliance Act here involved, that each car "requiring secure running-boards be equipped" therewith, and that each car having a ladder be equipped with "secure handholds or grabirons" on the roof of the car at the top of the ladder, was to provide employes who might, in the course of their duties, be required to go upon the roofs of such cars, with safe and secure appliances so that they could safely ascend to, and descend from, such roofs.

That the petitioner in the instant case was a railroad employe, and that his duties required him to go upon the roof of the car in question, are beyond controversy. Accord-

ingly, petitioner came directly within the general class of persons named in the title and every part of the Safety Appliance Act as being, and intended to be, protected by the provisions of that act, and it became and was the absolute duty of the respondent Terminal Railroad Association of St. Louis to comply with such provisions in order to protect the life and limb of this petitioner.

The mere fact that the petitioner was a car inspector does not take him out of the class of employes protected by, and included within, the provisions of the Safety Appliance Act.

In the first place, there exists in the Safety Appliance Act no provision excluding car inspectors from its benefits.

In the second place, the nature or character of the work being done by the employe is immaterial, for, as this Court said in *Louisville & N. R. Co.* v. *Layton*, 243 U. S. 617, 621, 37 S. Ct. 456, 61 L. Ed. 931, 933:

> "• • • the liability in damages to employes for failure to comply with the law springs from it being made unlawful to use cars not equipped as required—not from the position the employe may be in or the work which he may be doing at the moment when he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable • • • in damages whenever the failure to obey the safety appliance laws is the proximate cause of injury • • • ."

To this same general effect are *Davis* v. *Wolfe*, 263 U. S. 239, 44 S. Ct. 64, 68 L. Ed. 284; and *Swinson* v. *Chicago, St. P. M. & O. R. Co.*, 294 U. S. 529, 55 S. Ct. 517, 79 L. Ed. 1041.

In the third place, the nature of the duty imposed by the section of the Safety Appliance Act here involved, and the benefits resulting from its performance, so obviously con-

tribute to the safety of car inspectors that it is hardly probable that Congress could have contemplated that the act would be inapplicable to the promotion of the safety of that particular class of railroad employees. See *Fairport, C. & E. R. Co.* v. *Meredith*, 292 U. S. 589, 54 S. Ct. 826, 78 L. Ed. 1146. We venture that the use of the running-boards and grabirons or handholds on the roofs of cars by car inspectors is, probably, the predominant and majority use of those particular safety appliances. Although other classes of trainmen do make extensive use of the lower part of the said ladders in switching operations, and in getting to the brake platforms, which are not on the roofs of the cars, and although they do make some use of the longitudinal running-boards on the tops of the cars, they do not, ordinarily, have occasion to use each grabiron on the roof of each car in a cut or string of cars, while a car inspector, of necessity, uses each ladder of each car, together with each grabiron on the roof at the top of such ladder, in making a proper inspection. We believe that it is only reasonable to conclude that the promotion of the safety of car inspectors is a result so readily perceivable that it lies directly within the purview of the requirements that secure running-boards and handholds or grabirons be attached to the roofs of cars at the top of the ladders. That car inspectors need the protection of running-boards on the roofs of cars, and handholds or grabirons on the roofs of cars at the tops of the ladders on the cars is, to us, so obvious that it cannot be said that those particular safety appliances were not intended for the protection of that class of railroad employes. The promotion of the safety of persons who were required to go upon the roofs of cars being the purpose of these particular provisions of the statute, it necessarily follows that anyone whose business calls him to be upon the roof of a car has a right to complain if the

carrier fails to comply with its statutory duty and such failure results in injury to that person.

Conclusion.

From the foregoing, we submit that it appears clearly from the facts in this case that the car from which petitioner fell was in use by the respondent Terminal Railroad Association of St. Louis at the time of petitioner's injury; that it was not equipped with a secure handhold at the top of the ladder, and that by reason thereof the handhold became detached and caused petitioner to fall and be injured; that petitioner was within the class of persons intended to be, and in fact being, protected by the provisions of the Safety Appliance Act; and that, under the interpretation of that act adopted by this Court, the petitioner's right of recovery upon such showing was complete.

It consequently follows that the Supreme Court of Missouri erred in reversing the judgment secured by this petitioner on the theory that no violation of the Federal Safety Appliance Act by respondent was shown, and that petitioner was not entitled to recover. We, therefore, respectfully submit that this Honorable Court should reverse the judgment and decision of the Supreme Court of Missouri, in order that the errors therein may be corrected, and in order that petitioner may receive the benefits of the Federal Safety Appliance Act as that Act is construed and applied by this Court.

Respectfully submitted,

MARK D. EAGLETON,
Counsel for Petitioner.

MERRITT U. HAYDEN AND
ROBERTS P. ELAM,
Of Counsel.

APPENDIX.

Federal Safety Appliance Act.

We set out below, for the convenience of the Court in reference, various sections of the Federal Safety Appliance Act as the same appear in the United States Code, parts of which we have emphasized:

"SECTION 1. *Driving-wheel brakes and appliances for operating train-brake system.*—It shall be unlawful for any common carrier engaged in interstate commerce by railroad *to use on its line* any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or *to run any train in such traffic* that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose." (Mar. 2, 1893, c. 196, Sec. 1, 27 Stat. 531). 45 U. S. C., Sec. 1.

"SEC. 2. Automatic couplers.—It shall be unlawful for any common carrier engaged in interstate commerce by railroad *to haul or permit to be hauled or used on its line* any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." (Mar. 2, 1893, c. 196, Sec. 2, 27 Stat. 531). 45 U. S. C., Sec. 2.

"SEC. 3. *Refusal of insufficiently equipped cars from connecting lines.*—When any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section 1 of this chapter, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this chapter, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this chapter." (Mar. 2, 1893, c. 196, Sec. 3, 27 Stat. 531). 45 U. S. C., Sec. 3.

"SEC. 4. *Grabirons or handholds for security in coupling and uncoupling cars.*—Until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company *to use* any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." (Mar. 2, 1893, c. 196, Sec. 4, 27 Stat. 531). 45 U. S. C., Sec. 4.

"SEC. 5. *Standard height of drawbars for freight cars; noncomplying cars excluded from traffic.*—No freight cars, either loaded or unloaded, *shall be used* in interstate traffic which do not comply with the prescribed standard as to height of drawbars." (Mar. 2, 1893, c. 196, Sec. 5, 27 Stat. 531). 45 U. S. C., Sec. 5.

"SEC. 6. *Failure to equip cars as provided; duty of district attorneys and Interstate Commerce Commission; exceptions from operation of provisions.*—Any common carrier engaged in interstate commerce by railroad *using* any locomotive engine, *running* any train, *or hauling or permitting to be hauled or used on its line* any car in violation of any of the preceding provisions of this chapter, shall be liable to a penalty of $100 for each and every such violation. * * *" (Mar. 2, 1893, c. 196, Sec. 6, 27 Stat. 532; Apr. 1, 1896, c. 87, 29 Stat. 85). 45 U. S. C., Sec. 6.

"SEC. 7. *Assumption of risk by employes.*—Any employe of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car or train *in use* contrary to the provision of this chapter shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge." (Mar. 2, 1893, c. 196, Sec. 8, 27 Stat. 532). 45 U. S. C., Sec. 7.

"SEC. 8. *Provisions of Chapter Extended.*—The preceding provisions and requirements of this chapter shall be held to apply to common carriers by railroads in the territories and the District of Columbia and shall apply

in all cases, whether or not the couplers brought together are of the same kind, make or type; and the provisions and requirements relating to train brakes, automatic couplers, grab irons and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles *used* on any railroad engaged in interstate commerce, and in the territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles *used* in connection therewith, * * *." (Mar. 2, 1903, c. 976, Sec. 1, 32 Stat. 943). 45 U. S. C., Sec. 8.

"SEC. 11. *Safety Appliances Required for Each Car —When Hand Brakes May Be Omitted.*—It shall be unlawful for any common carrier subject to the provisions of this chapter *to haul,* or *permit to be hauled, or used on its line,* any car subject to the provisions of this chapter not equipped with appliances herein provided for, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, *and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders;* Provided, that in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose." (Apr. 14, 1910, c. 160, Sec. 2, 36 Stat. 298). 45 U. S. C., Sec. 11.

"SEC. 13. *Penalty for Using Car Not Equipped as Provided—Hauling Car for Repairs Where Equipment Becomes Defective—Liability for Death or Injury of Employe—Use of Chains Instead of Drawbars.*—Any common carrier subject to this chapter *using, hauling, or permitting to be used or hauled on its line,* any car subject to the requirements of this chapter not equipped as provided in this chapter, shall be liable to a penalty of $100 for each and every such violation, to be recovered as provided in section 6 of this chapter: Provided, that where any car shall have been properly

equipped, as provided in this chapter, and such equipment shall have become defective or insecure *while such car was being used by such carrier upon its line of railroad,* such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by this section or section 6 of this chapter, if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point; *and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employe caused to such employe by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or where it is not maintained in accordance with the requirements of this chapter;* and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or 'perishable' freight." (Apr. 14, 1910, c. 160, Sec. 4, 36 Stat. 299). 45 U. S. C., Sec. 13.

"SEC. 14. *Liability for Using Car With Defective Equipment, Except as Specified.*—Except that, within the limits specified in the preceding section of this chapter, the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in sections 11, 12 and 13 of this chapter shall be held or construed to relieve any common carrier, the Interstate Commerce Commission or any United States Attorney from any of the provisions, powers, duties, liabilities or requirements heretofore set out in this chapter; and, except as aforesaid, all of such provisions, powers, duties, requirements and liabilities shall apply." (Apr. 14, 1910, c. 160, Sec. 5, 36 Stat. 299.) 45 U. S. C., Sec. 14.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 163.

THOMAS J. BRADY,

Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

REPLY BRIEF OF PETITIONER.

MARK D. EAGLETON,
Counsel for Petitioner.

MERRITT U. HAYDEN,
ROBERTS P. ELAM,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Statement	1
Case concededly controlled by Safety Appliance Act	2
No assumption of risk by petitioner	2
Petitioner within class of persons within protection of Safety Appliance Act	3
No negligence on part of petitioner	7
Conclusion	9

Cases Cited.

Brady v. Wabash Ry. Co., 329 Mo. 1123, 49 S. W. (2nd) 24	5
Kurtz v. Detroit T. & I. R. Co., 238 Mich. 289, 213 N. W. 169	4
Louisville & Nashville R. Co. v. Layton, 243 U. S. 617, l. c. 620	3

Statute Cited.

Safety Appliance Act, Sec. 7 (March 2, 1893, c. 196, Sec. 8, 27 Stat. 532, 45 U. S. C. § 7)	2

SUPREME COURT OF THE UNITED STATES.

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REPLY BRIEF OF PETITIONER.

Petitioner's original brief, in the main, was devoted to showing that the Supreme Court of Missouri erred in holding that the cars involved were not in use at the time of petitioner's injury. As a concomitant matter, it was shown that the petitioner's injuries were directly and proximately due to the failure of the respondent to comply with the requirements of the Safety Appliance Act.

The respondent, in its brief, labors long in an effort to show that the petitioner was not within the class of persons intended to be protected by the Safety Appliance Act. This brief is to answer that proposition.

Case Concededly Controlled by Safety Appliance Act.

Both parties are agreed that "the train of cars was in the possession of defendant (respondent), for they had not as yet been delivered to the Wabash * * *" (Respondent's Brief, p. 29). Petitioner contends that the Federal Safety Appliance Act exclusively governs this case, and respondent is apparently in accord with this thought, for it states, "* * * we think the case is governed solely by the Federal Safety Appliance Act and the federal law" (Respondent's Brief, p. 24).

No Assumption of Risk by Petitioner.

Notwithstanding that both parties agree that the Safety Appliance Act, and that act alone, must govern petitioner's rights, the respondent, in its brief, attempts to argue that petitioner cannot recover because he should be held to have assumed the risk (Respondent's Brief, pp. 29-30). A complete answer to such contention is that Section 7 of the Safety Appliance Act, which concededly governs this situation, abolished the defense of assumption of risk in the following language:

> "Any employee of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car or train in use contrary to the provisions of this chapter shall not be deemed thereby to have assumed the risk thereby occasioned, * * *" (March 2, 1893, c. 196, Sec. 8, 27 Stat. 532, 45 U. S. C. § 7.)

Petitioner Within Class of Persons Within Protection of Safety Appliance Act.

Respondent, in its brief, states (p. 29):

> "It is true that defendant (respondent) tendered the car to the Wabash and therefore to plaintiff (petitioner) for inspection, but that was plaintiff's business, that of inspection. His class of work puts him out of the protection of the grabiron act, and he assumed the risk." (Parenthetical portions ours.)

We submit that the Safety Appliance Act is not restricted in its application in the manner above contended by respondent. The act is not confined to any specified class of employees. This Court has consistently ruled, since the decision in Louisville & Nashville R. Co. v. Layton, 243 U. S. 617, l. c. 620, that:

> "The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from it being made unlawful to use cars not equipped as required—not from the position the employee may be in *or the work which he may be doing at the moment when he is injured.* This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them *when engaged in the discharge of duty.*"

We do not believe that these holdings can be overthrown or their effect obviated by a contention that the petitioner's duties, of necessity, required him to submit himself to any danger which might arise from a defective safety appliance. While it is true that, in inspecting these interstate

cars, in order to facilitate their journey, petitioner was looking for defects and he was subject to the slight danger incident to such an inspection, the respondent should not be permitted to greatly increase the danger to petitioner as a result of its failure to comply with its mandatory, absolute and continuous duty under the law, without incurring liability for petitioner's injuries resulting from such greatly increased danger. The necessary effect of holding otherwise would be that respondent could fail utterly to discharge its duties under the act and could tender to any receiving carrier cars which were positively defective and in violation of the Safety Appliance Act, and yet be absolved of all liability for injury resulting therefrom, although knowing that an inspector for the receiving carrier would necessarily have to encounter such increased dangers resulting from the defects in order to properly perform his duty to determine whether the cars should be accepted or rejected by his employer (R. 54). In requesting this Court to so hold, respondent cites the case of Kurtz v. Detroit T. & I. R. Co., 238 Mich. 289, 213 N. W. 169, in which it was held, substantially, that no liability could attach to the delivering carrier *after an inspection was made by the receiving carrier and after the receiving carrier had accepted the cars and put them in service.* From that case it is plain that if the delivering carrier's duty ends after an inspection and acceptance on the part of the receiving carrier, then it necessarily follows that the duty of the delivering carrier continues until such events have in fact transpired. In the instant case the respondent, as the delivering carrier, is not in the same position as that of the petitioner's employer, the receiving carrier. The receiving carrier (petitioner's employer, the Wabash Railway Company) had the right to determine whether the

cars tendered to it by the respondent delivering carrier complied with the Safety Appliance Act (45 U. S. C., § 3), and the right to accept or reject, as it saw fit, any defective cars; and until such time as acceptance or rejection took place, the cars remained in the use and service of the respondent delivering carrier. For the purpose of exercising such rights, the receiving carrier (Wabash Railway Company) had the inherent right to cause petitioner, as its agent and servant, to make the inspection. Petitioner, therefore, might well be adjudged to have no rights under the Safety Appliance Act in so far as his employer, the Wabash Railway Company, was concerned, because his employer had neither hauled, used nor accepted the cars, and, further, because his employer was entitled to delegate the duty of inspection to petitioner without becoming liable for defects which existed by reason of any failure on the part of the respondent delivering carrier (Brady v. Wabash Ry. Co., 329 Mo. 1123, 49 S. W. [2nd] 24). Obviously, the respondent delivering carrier is not in the same position. Its position is the direct opposite. It follows just as surely as night follows day that, if the receiving carrier is not liable because it must be given the opportunity of inspection and of acceptance or rejection, the delivering carrier must contemplate such inspection, and its liability is absolute because it has had the opportunity of inspection and has hauled and continued to use a car with defective equipment.

Notwithstanding the foregoing, the respondent would appear to argue that its position was identical with that of the receiving carrier. It contends for the same immunities that might be extended to the receiving carrier. It employs strong language in an effort to be persuasive on this point. It states, at page 24 of its brief, that, "In hunting

for defective safety appliances an inspector puts his head in the lion's mouth." Again, it states, at page 31 of its brief, that "Plaintiff (petitioner) was an inspector charged with the duty of finding defects, that of putting his head in a lion's mouth or feeding a cobra. It was his duty to protect himself from being bitten by them." Apparently, Congress must have realized that defective safety appliances were almost as dangerous as a lion or a cobra, and hence it enjoined upon the delivering carrier the absolute duty to see that cars with defective safety appliances thereon were not used in being tendered to receiving connecting carriers. This vague talk about a lion or a cobra will not change the delivering carrier's position—it only serves to emphasize the character of respondent's violation of its duties. Respondent positively knew that an inspector of the receiving carrier would be compelled to encounter the defective equipment upon the cars if tendered in violation of law (R. 54). Respondent arrogantly sets up its own violation of law as a complete defense, when, as a matter of fact, the law gives employees such as the petitioner an absolute right of action for injuries caused by such a violation. The mere fact that the petitioner could not enforce liability as against his employer, who stood in an entirely different position because it had neither hauled, used, nor accepted the defective equipment prior to petitioner's injury, certainly cannot be held to avail the respondent.

It cannot be seriously stated that Congress intended to restrict the humane provisions of the Safety Appliance Act to the smallest possible number of employees, especially when it is considered that employees of the character of petitioner are the very ones who must use *all* of the safety appliance equipment in order to properly perform their duties. A brakeman, or a switchman, may use a particular handhold on a particular car. With fifty cars in a train,

he will probably use but very few of the great number of handholds on said train. The inspector for a receiving carrier, however, must use *all* of the handholds on *all* of the cars in order to properly perform his duties. He is, therefore, the one person who has a greater use of these appliances than any other. Can it logically be said that the one person who must use these appliances more than any other individual is the only person that Congress intended should not be covered by this enactment? The respondent knew full well that this petitioner, or another employee of his character, would have to make an inspection of the cars tendered by respondent before petitioner's employer, the Wabash Railway Company, would accept the cars (R. 54). Aside from the crew operating the train tendered for transfer, the petitioner and his fellow employee were the very persons who most needed the beneficent protection of the safety appliance legislation. We think that it does not rise to the height of respectable nonsense to contend that the delivering carrier (respondent in the instant case) is not liable merely because a receiving carrier would not be liable under the same circumstances.

No Negligence on Part of Petitioner.

Respondent states, at page 32 of its brief, "that plaintiff (petitioner) exercised all the care possible, in testing it (i. e., the grab iron), by shaking it with his hand before he put his weight on it, and yet he did not discover that the grab iron in any way was defective." It should be remembered that this accident occurred during the nighttime (R. 15); that this particular grab iron was upon the roof of the car (R. 19, 20); that plaintiff's body, while ascending the ladder, was at all times below the roof level (R. 51-52, 55); that he reached above his head and placed

his hand upon the grab iron for the purpose of pulling himself upwards (R. 51-52); that such was the regular method of using said grab iron. We mention these details merely to show that petitioner had no opportunity to discover the rotted condition of the roof, which made said grab iron insecure. Concededly, he used extraordinary care, but that was not sufficient to protect him. He had no right to assume that respondent had set a trap for him, nor that it had failed in its duty under the law. True, he was looking for defects. What defects? Those defects which were likely to develop since it was last inspected. Ordinarily, his duty is not fraught with peril. Had respondent performed its duty, this car would not have been delivered in that condition in violation of law. Petitioner, in the ordinary course of duties, might find a "hotbox," a bad coupler, a defective drawbar, an inefficient brake, an inoperative pin lifter, a broken seal, and yet finding such would not entail danger to him. It is hard to imagine how petitioner could have been subjected to a greater hazard than to have his path of work endangered by a defective grab iron on the car roof. This defect created an unusual hazard in the very path of petitioner's place of work. Had respondent's employees negligently placed an obstruction on the ground in such place that it was certain to cause injury to inspectors for a receiving carrier, would their employer be acquitted of liability? Would it be heard to answer, "You are an inspector and therefore your limbs may be broken without recompense"? Such would be untenable. Yet here we have a delivering carrier guilty of a positive violation of law setting up its violation as a defense. It says, at page 32 of its brief, "If plaintiff did not discover the defect upon using extraordinary care, then should defendant be held to an absolute discovery of it under rule?" The answer is emphatically yes, a thousand

times yes, because the law so states. The law makes the duty absolute. It is not a question of negligence vel non. Congress undoubtedly recognized the futility of one such as petitioner being able to establish whether or not the delivering carrier had made necessary inspections prior to its hauling and using the car. Congress unquestionably realized that the very person who was most likely to be injured, through such failure on the part of the delivering carrier, was an inspector for the receiving carrier, who was required to encounter such defect before such car would be accepted by his employer. The law is so written.

Conclusion.

The instant case is not one where a defect was discovered by petitioner prior to his injury. It is not a case where a repair was in process. Nor is it a case where a car has been withdrawn from service and placed upon a bad-order track. This is a case in which the defective car was still coupled to other cars of a train, the entire train then and there being tendered for transfer by the respondent delivering carrier to the petitioner's employer, the receiving carrier. The defective car, along with all the other cars, was actually in service and use. Their tender for transfer was but one step farther on their interstate journey. Their further movement was in immediate contemplation. They were no more out of service because they were motionless, or because the motive power had been detached, than would an automobile be out of service while its driver was making a delivery in a building, such driver having shut off the engine of the automobile and taken the keys with him.

We most earnestly submit, therefore, that this defective car which caused petitioner's injury, as well as all the

other cars which were coupled together in the train being tendered by respondent to petitioner's employer, were actually under the possession and control of the respondent and in its use and service, and that they would remain in such use and service until accepted or rejected by the receiving carrier; that the Safety Appliance Act exclusively governs petitioner's right of action; that petitioner was injured as a direct and proximate cause of respondent's failure to comply with the Safety Appliance Act, in that respondent handled and **used** this car upon its road and **used** this car in tendering it to the receiving carrier, while in a defective condition, with conscious knowledge of the fact that an inspector would be required to use its grab irons; and that the petitioner, as an inspector for the receiving carrier, was a railroad employee and was one of the employees for whose benefit the Safety Appliance Act was enacted.

Accordingly, we most respectfully submit that the judgment of the Supreme Court of Missouri, here being reviewed, should be reversed.

Respectfully submitted,

MARK D. EAGLETON,
Attorney for Petitioner.

MERRITT U. HAYDEN,
ROBERTS P. ELAM,
Of Counsel.

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SUPREME COURT U.S.
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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 163.

THOMAS J. BRADY,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Respondent.

On Writ of Certiorari to the Supreme Court of Missouri.

STATEMENT, BRIEF AND ARGUMENT FOR THE RESPONDENT.

THOMAS M. PIERCE,
JOSEPH L. HOWELL,
WALTER N. DAVIS,
Counsel for Respondent.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Statement of the case	1
Assignment of errors	13
Points and authorities	14
Brief of the argument	18
Position of respondent that Wabash car No. 76085 was not in use at the time of the accident within the meaning of 45 U. S. C. A., Sections 11 and 13	18
Position of respondent that a car inspector hunting for defects and defective safety appliances does not come within the purview of 45 U. S. C. A., Sections 11 and 13	23
Position of respondent that the defective grab iron on Wabash car No. 76085 was not the proximate cause of petitioner's injuries	33
Position of respondent that petitioner, a car inspector, assumed the risk of finding defective safety appliances	34
Position of respondent that petitioner's act of inspection, as alter ego of master, intervened to break the causal connection when Wabash Railway Company accepted the car for inspection	35
Position of respondent that petitioner's instruction No. 1 constituted error	36
Position of respondent that trial court erred in permitting petitioner to introduce in evidence rule No. 2	38
Position of respondent that damages awarded by jury are excessive	39

Cases Cited.

Allen v. Terminal Railroad, 68 S. W. (2d) 709 (Mo.).. 16
Brady v. Wabash R. Co., 329 Mo. 1123, 49 S. W. (2d) 24, 83 A. L. R. 655.....2, 14, 15, 21, 29
Brady v. Terminal Railroad, 102 S. W. (2d) 903 (Mo.) 14, 18
Baltimore & Ohio R. Co. v. Hooven, 297 Fed. 919..... 14
C. & O. Ry. Co. v. Mihas, 280 U. S. 102, 50 S. Ct. 42, 74 L. ed. 207.....16, 31
C. & O. Ry. Co. v. Nixon, 271 U. S. 218, 46 S. Ct. 945, 70 L. ed. 914.....16, 31
C. & O. Ry. Co. v. Stapleton, 279 U. S. 587, 49 S. Ct. 422, 73 L. ed. 861..... 16
Chicago etc. R. Co. v. Coogan, 271 U. S. 472, 46 S. Ct. 564, 70 L. ed. 1041..... 17
Davis v. Wolfe, 263 U. S. 239, 44 S. Ct. 64, 68 L. ed. 284 .....15, 33
Flynn v. Kramer, 271 Mich. 500, 261 N. W. 77.....17, 43
Gilvary v. Cuyahoga V. R. Co., 292 U. S. 57, 54 S. Ct. 573, 78 L. ed. 1123..... 16
Kaminski v. C. M. & St. P. R. Co., 180 Minn. 619, 213 N. W. 189, certiorari denied 282 U. S. 872, 51 S. Ct. 78, 75 L. ed. 770.....14, 21
Kansas City, M. & O. Ry. Co. v. Wood, 262 S. W. 520 (Tex. Civ. App.).....14, 26
Kurtz v. Detroit T. & I. R. Co., 238 Mich. 289, 213 N. W. 169.....14, 19, 21
Lang v. Railroad, 255 U. S. 455, 41 S. Ct. 381, 65 L. ed. 729 .....15, 26, 33
L. & N. R. Co. v. Cook, 150 Ky. 689, 150 S. W. 802...15, 27
McCalmont v. Penn. R. Co., 283 Fed. 736.....14, 20
Martin v. Wabash R. Co., 325 Mo. 1107, 30 S. W. (2d) 735 .....16, 28

Minneapolis etc. R. Co. v. Popplar, 237 U. S. 369, 35 S. Ct. 609, 59 L. ed. 1000 16
Moore v. Railroad, 291 U. S. 205, 54 S. Ct. 402, 78 L. ed. 755 16
N. Y. etc. R. Co. v. Kelly, 70 Fed. (2d) 548, certiorari denied 293 U. S. 595, 55 S. Ct. 110, 79 L. ed. 689 ..... 14, 19
Noftz v. B. & O. R. Co., 13 Fed. (2d) 389 ..... 15, 27
Railroad v. Conarty, 238 U. S. 243, 35 S. Ct. 785, 59 L. ed. 1290 ..... 15, 25, 33
Railroad v. McWhirter, 229 U. S. 265, 33 S. Ct. 858, 57 L. ed. 1179 15
Reetz v. C. & E. I. R. Co., 46 Fed. (2d) 50 21
Rittenhouse v. Railroad, 299 Mo. 199, 252 S. W. 945 ..... 15, 26
St. L. S. W. Ry. v. Johns (Tex. Civ. App.), 286 S. W. 281 15
Stein v. Battenfield O. & G. Co., 327 Mo. 804, 39 S. W. (2d) 345 ..... 16, 30, 34
Sherry v. B. & O. R. Co., 30 Fed. (2d) 487 ..... 14, 20
Thomson v. Downey, 78 Fed. (2d) 487 ..... 16, 17, 39
Toledo etc. R. Co. v. Allen, 276 U. S. 165, 48 S. Ct. 215, 72 L. ed. 513 ..... 15, 28

United States Statutes.

45 United States Code Annotated, Sections 11 and 13 ..... 14, 18

IN THE

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THOMAS J. BRADY,
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vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Respondent.

On Writ of Certiorari to the Supreme Court of Missouri.

STATEMENT, BRIEF AND ARGUMENT FOR THE RESPONDENT.

STATEMENT.

This is an action for damages for personal injuries, predicated on a Federal Employers' Liability Act and a Federal Safety Appliance Act, known as the Grab Iron Act. The jury returned a verdict in favor of plaintiff and against defendant in the sum of $15,000.00, and de-

fendant appealed from the judgment entered on the verdict.

Plaintiff is the same as the plaintiff in Brady v. Wabash R. Co., 49 S. W. (2d) 24. Generally speaking, the facts are the same.

The facts adduced on behalf of plaintiff warrant the finding that plaintiff, thirty-one years of age, a car inspector in the employ of the Wabash Railroad Company, earning $175.00 a month, was injured at Granite City, Illinois, on November 20, 1927, about 9:30 or 10:00 o'clock in the evening, when a grab iron on Wabash Railroad Company car No. 76085, which had just been transported in a train of cars from St. Louis, Missouri, to Granite City, Illinois, pulled loose and caused him to fall to a depth of 10 or 12 feet to the ground on his back, during his inspection of said Wabash car, to determine whether the safety appliances on said car and train of cars were in proper condition. Said car and train of cars had been delivered by defendant to said Wabash Railroad Company about three hours before. The purpose of the inspection was to determine whether or not the cars were to be accepted by the Wabash. If the cars were in condition to continue the journey, they would be carded. Between 50 and 60 cars were in said drag or train and he had inspected 35 or 40 cars before the accident.

At the time of his injury, plaintiff was engaged in inspecting said train of cars, on track No. 11, in the Wabash yards, at Granite City, Illinois, which track and yards were owned by the said Wabash Railroad Company. Plaintiff was classed as a car inspector. Plaintiff said that, at the time of his injury, he was going to inspect the roof of this Wabash car, and, when he got to the top, going up the ladder, he flashed his light on the side ladder to see if it

were in good shape and, when he got up to the top, he got hold of the top iron to pull on it and, when he pulled on the top grab iron, it felt firm and solid, but when he started to go up on the top of the car and put his weight on it, the whole ladder pulled off and he fell to the ground. His purpose was to go to the top of the ladder to inspect the roof. He had his lantern in his left hand, and flashed his light on the grab iron to see if the nails were on it. The grab iron sets 12 to 14 inches from the side of the car, running parallel with the side of the car, and is made of wrought iron. It is attached to the wooden latitudinal running board by straps of iron and half inch bolts on either side. The grab iron felt firm when he took hold of it, but the latitudinal running board pulled off at the back end when he put his weight on it. The wood was old and rotten and was rotted around the bolt. No engine was attached to the train of cars while plaintiff was inspecting them; the train had not been broken up, the cars were coupled together and they were just as they came in.

Plaintiff said that it was his duty, as Wabash inspector, to inspect all cars delivered there, no matter what road delivered them, whether it was the Pennsylvania or Terminal Railroad. It was his duty to inspect cars to see if they were in a safe and serviceable condition to continue on. In inspecting the cars on this occasion, he was looking for defects on all running gears and safety appliances and everything. He said that the grab iron that he caught hold of and that pulled out was a safety appliance. The Wabash knew that he inspected all cars that were delivered to it, and defendant knew that he would make that kind of an inspection. The purpose of the inspection was to determine whether the cars were to be received or rejected by the Wabash, to see whether

there was any reason why the car was to be rejected or whether it was O. K., and he was in the act of inspecting it when he fell.

Plaintiff said that the Wabash Railroad Company and defendant were subscribers to the A. R. A. rules. Plaintiff then offered in evidence Rule 2, reading:

> "Rule 2. Yard interchanging cars. Paragraph 3. Cars (whether loaded or empty) having defects in violation of the Safety Appliance Act should not be offered in exchange."

The car that plaintiff was inspecting at the time of his injury belonged to the Wabash Railroad Company, his employer.

It was agreed that Wabash car, No. 76085, was received by defendant from the Wabash Railroad Company, at defendant's Grand Avenue Yards on November 16, 1927, and on the same date was transferred by defendant to its Bremen Avenue Yards, and later on same date was transferred by defendant to its Tenth Street Yards, where it remained until November 17th, and that it was placed on November 17, 1927, in the Tenth Street warehouse, where it remained until November 20, 1927, when defendant pulled it from the warehouse and placed it on track 11, in the Wabash Yards at Granite City, Illinois, about 6 P. M. on November 20, 1927. Plaintiff said that defendant received that car from the Wabash and switched it to some industry and then switched it back and tendered it to the Wabash.

It was agreed that the Wabash Railroad Company and defendant were common carriers engaged generally in interstate commerce. It was further agreed that a string of cars, of which Wabash car 76085 was one, was brought

over on November 20, 1927, by defendant from St. Louis, Missouri, to Granite City, Illinois, all of which cars were coupled together at the time plaintiff was inspecting them for the Wabash Railroad Company and was injured, and that said cars had moved in interstate commerce and contained shipments that were being moved in interstate commerce, and among them were cars destined for foreign cities located in states other than the State of Missouri and the State of Illinois.

Plaintiff's evidence as to his injuries tends to show that plaintiff landed on his back when he fell. That about a half hour after the accident he was taken to the Granite City Hospital, where he remained for two or three weeks, although the hospital records show that he was discharged therefrom on November 26, 1927, six days after the accident. They bandaged his back and treated his left hip, where it was cut, bruised and rubbed by the cinders. Three or four days after he returned home, for possibly a month or two, he was taken back and forth to the office, where he remained for several hours. He was still being treated by the Wabash doctor at Granite City. He suffered pain every day in the middle of his back. His hips were bruised and he had trouble getting up and down, and used a cane. While at the Wabash office he was not required to do any work. He made no improvement at all while under the care of the Wabash doctor, he got worse all the time. He then went to see Dr. Meinhardt, who treated his back electrically and massaged it. At the time of the accident, he weighed 155 pounds. At one time thereafter he weighed 115 pounds. In 1929, he went to Western Texas and remained a year and a half, and up to that time he never worked. Since the accident he had worked about 15 days on a vegetable truck, but his back hurt

and he became nervous. He wears all the time a brace composed of canvas and leather strips. He had no difficulty or pain or inconvenience or discomfort of any kind in his back or any other part of his body before the accident. Recently, Dr. Meinhardt has given his back electrical treatments.

Plaintiff's evidence tends to show by his witness, Dr. Meinhardt, that plaintiff first saw said doctor the early part of January, 1928. At that time he had a large amount of tenderness over the entire back extending from the lower part of the shoulders down to the hip, and the muscles of those regions were tender on pressure or palpation; the muscles were rigid and somewhat tender and boardlike. He was nervous. At that time he weighed 145 to 150 pounds and he complained of headaches, pain in both hips, inability to stoop or bend over, and his back became worse when he moved around. The treatment prescribed was rest and heat to the back. His muscles also were given massage. He was given liniment for his hips and sedatives to rest and sleep. His back was taped with adhesive which was kept on for one, two or three months. A supportive belt was suggested and plaintiff has worn two or three while under the doctor's care. In 1929, X-ray pictures were taken, but were not produced at the trial, as those pictures, during a former trial, were left at the courthouse. The doctor's diagnosis was a hyperthropic arthritis of the spine. He shows a projection of bone in the spinal vertebrae and a growing between that is abnormal. The doctor is waiting for this condition to become solid and there is not much that can be done for him medically. The doctor expects the bones to become fused or ankylosed. This condition exists between the 10th and 11th vertebrae, corresponding to the 10th and 11th ribs,

and located about the middle of the back. The spine ankylates backward in this region. He has a curvature of the spine to the left which is congenital. An arthritic condition two weeks after the injury would be too soon to say that that was due to the injury. The doctor found increased arthritic deposits between the 10th and 11th vertebrae. Plaintiff had an arthritic condition which antedates the injury, but that since the injury the X-rays show that the projection of bone has increased. In a general way, if the condition were permanent previous to the accident, we can assume that it became lighted up, and in the doctors' opinion this fall lighted up the condition and caused this bone. The condition is very painful. Plaintiff has a disability with respect to manual work, and after that he will have a disability because of the back being stiff.

On cross-examination, Dr. Meinhardt said that plaintiff at present weighs 150 pounds, that plaintiff can work, depending upon the kind of work, and that there are some types that he should be able to do. He does not think that plaintiff was as agile as he was previously. Even with a pain a man can do things. Plaintiff has had no broken bones that the doctor found. The X-ray pictures that the doctor took on January 17, 1928, showed a condition of some bony growth in the lumbar region. The ankylosis condition now is between the 10th and 11th thoracic vertebrae, two vertebrae above the part that the doctor X-rayed on January 17, 1928. The ankylosis condition is in the lower part of the back and the chest and the doctor did not take an X-ray of the bones of the thoracic vertebrae. Of his own knowledge the doctor does not know whether there is an ankylosis condition. He did not know whether the ankylosis condition was there previously. The spurs

may be a result of the condition existing. He X-rayed plaintiff three times, but he never X-rayed the place of this ankylosed condition. The original arthritis was due to a diseased condition and it must have existed before the injury. The X-rays did not show any broken bones. The bone growth of the upper lumbar region that plaintiff had could not occur in a week or two. From history of the patient, the doctor believed that the injury was lighting up the condition. The part of the back that the doctor X-rayed was due to hypertrophic arthritis and the accident of November 27, 1927, had nothing to do with it. Plaintiff complained to the doctor only of his back and hips and headaches. He did not complain of falling on his head or tell the doctor that he had hit on his head.

Plaintiff's testimony tends to show by his witness, Doctor Peden, an X-ray expert, that he made X-ray pictures of plaintiff's spine and back on February 19, 1929. The X-ray pictures showed a slight amount of hypertrophic changes with a slight new bone projection on the 11th thoracic vertebrae. Instead of the bone being rounded, as it normally should be, it comes to a point. On October 3, 1932, the doctor took another X-ray of plaintiff. On the 12th thoracic vertebrae there was a definite projection or increase in this bony projection, and in addition, between the 10th and 11th, there is almost a complete fusion between the vertebrae. The two points have practically grown together and are attempting to form a union between the bones. The upper 10th has a little projection that he was unable to see in the 1929 pictures. The process as shown on the lower right side of the 11th thoracic vertebrae is very definitely increased in the last year. The doctor did not take the X-ray pictures for treatment. On taking the first X-ray pictures he could not see anything

in the way of fractures or dislocations, or anything of that sort. The 11th thoracic was the one that really was the most involved. His lumbar spine was comparatively normal. Hypertrophic arthritis may be due to infection or injury or changes in the glandular system, such as the thyroid and pituitary and other glands of the body or metabolism, the building or the tearing down of the tissues, or disease. It takes hypertrophic arthritis 6 months at the earliest to show in an X-ray examination following a definite cause. The doctor did not know whether the conditions found in the X-ray photographs existed or not before November 20, 1927, nor do the X-rays tell him that.

Plaintiff's testimony tends to show through his witness, Dr. Pernoud, that he first examined him on February 29, 1929. He found his back from his neck to his hips more or less rigid, the spine movements carefully guarded and the range of motion of the spine inhibited and less than normal. A tenderness on pressure around the spine existed and was dense and drawn tighter than his normal condition, which the doctors call muscle cord. The medical picture was what is called arthritis of the spine. He did not have plaintiff under observation for the purpose of treating him. He examined him on October 3, 1932, and found the previous conditions existing. He also found a slight lateral curvature of the spine which was not due to any malformation of the spine as he saw it. On the first examination, he complained of pain in his left hip, which had subsided. He had no complaint about his hips, but was wearing a supporting belt, and it appeared that the muscles were more rigid upon his examination on October 6, 1933. Plaintiff could not go up and down ladders on cars or move with agility when stepping or bending because of the stiffening of his back. If he did this for any period at all the pain would become so excruciating

that he might even faint or fall because of the shock. In the future he will still continue to suffer pain. It was the doctor's opinion it is permanent and that the active process will continue. The doctor's opinion was that the violence of the spine activity was reinflamed, that is, that it re-enacted the arthritis of the spine. He could not do work of strong physical labor, lifting or that activity. He might work for considerable periods of time, but he could not do any job of labor that would entail 8 hours' work day by day. The doctor said that many cases of arthritis are the result of injury, but that the greater number of cases are the result of disease. He presumed that plaintiff's original arthritis was due to a diseased condition and that it could have happened from metabolism or infection. Trauma usually lights up an infection. But that plaintiff's condition of November 20, 1927, was aggravated by the injury. He had no opinion of the cause of the original arthritis. However, he had no way of knowing how long the condition that he found in February, 1929, as to the 10th, 11th and 12th thoracic vertebrae had been there. The doctor said in answering questions he took into consideration everything possible with the history included, including the history of brothers and sisters. He said that he would say that the activity of the arthritis started at one time.

Defendant's evidence tends to show by its witness, Dr. Will, that he first examined plaintiff on February 18, 1929. At that time he found no gross abnormalities about the back except that plaintiff was slightly stooped. The movements of his spine were present in all normal directions, there were no definite fixed points, there were no palpable bony abnormalities, no definite points of localized tenderness. The clinical tests were executed to their normal extent with no back pain and no evidence of lumbar

muscle spasms. The movements of the lower extremities were accomplished in the normal fashion, that is, outward, upward and backward and were accomplished to normal and were hyper-tests of the extremities. They failed to elicit any spasm in the back. The X-ray examination showed some hypertrophic changes to the upper margin of the 4th lumbar vertebrae, also some hypertrophic changes of the 4th dorsal high up in the back. These changes had been there for probably several years, but at least longer than 6, 8, 10 or 12 months. He found no bumps or soreness to account for a pain over the back of the head. The condition in his back would not account for it. He found nothing in his examination with respect to his hips or lower extremities by way of objective signs of injury, that is, there was no swelling or atrophy or limitation of motion or any physical findings that he could put his finger on, nothing we call objective findings. He found no muscle spasms. The doctor again examined him on September 26, 1933. On the first examination he weighed 125 pounds and on the second 153 pounds. He still showed the slightly stooped position. Putting him through the various clinical tests that he went through before, the doctor was unable to find any definite clinical evidence of a back injury, that is, there was no spasm or anything to point to any definite injury to the back. He found his hips normal, that is, he found nothing in the way of injury or disease or any evidence of any fracture or bone deformity. The X-rays showed a normal spine. They do, however, show some hypertrophic changes in the lower margin of the 11th dorsal or thoracic, more pronounced on the right side than on the left. The doctor found no reason for plaintiff wearing a truss. The 10th and 12th vertebrae were normal, but the 11th does show those hypertrophic spurs. He could see no evidence of ankylosis. He could find noth-

ing in his physical or X-ray examinations to account for any inability to work. He thought he could labor as a car inspector and climb up cars. Plaintiff's hypertrophic spurs were in his opinion due to the man's age and particular type of occupation. The doctor did not believe that the fall caused the hypertrophic spurs. If the spurs were not there on September 12, 1929, the fall did not cause them in his opinion.

ASSIGNMENT OF ERRORS

I.

The court erred, over defendant's objections and exceptions, in refusing to give and read to the jury, at the instance of defendant, instructions in the nature of demurrers to the evidence, offered by defendant both at the close of plaintiff's case and at the close of the whole and entire evidence and case.

II.

Plaintiff's instruction No. 1, is erroneous and the court erred in giving it.

III.

The court erred in admitting in evidence rule No. 2, to the effect that cars with defective safety appliances should not be offered in exchange.

IV.

The verdict was and is excessive.

POINTS AND AUTHORITIES

I.

Plaintiff failed to make a case for the jury because Wabash car No. 76085 was not, at the time of the accident, being hauled or permitted to be hauled or used on defendant's line of railroad within the purview of the United States Safety Appliance Acts.

45 U. S. C. A., sections 11 and 13;
Brady v. Wabash R. Co., 329 Mo. 1123, 49 S. W. (2d) 24, 83 A. L. R. 655;
Kurtz v. Detroit T. & I. R. Co., 238 Mich. 289, 213 N. W. 169;
Sherry v. B. & O. R. Co., 30 Fed. (2d) 487;
B. & O. R. Co. v. Hooven, 297 Fed. 919;
McCalmont v. Penn. R. Co., 283 Fed. 736;
N. Y. Etc. R. Co. v. Kelly, 70 Fed. (2d) 548, Certiorari denied, 293 U. S. 595, 55 S. Ct. 110, 79 L. ed. 689;
Kaminski v. C. M. & St. P. R. Co., 180 Minn. 619, 213 N. W. 189, certiorari denied, 282 U. S. 872, 51 S. Ct. 78, 75 L. ed. 770;
Brady v. Terminal Railroad, 102 S. W. (2d) 903 (Mo.).

II.

Plaintiff failed to make a submissible case for the reasons following:

(A)

Plaintiff, in inspecting Wabash car No. 76085, for defects, was not within the provisions of the Safety Appliance Act, or the rule or regulation.

Kansas City. M. & O. Ry. Co. v. Wood, 262 S. W. 520;

Rittenhouse v. Railroad, 299 Mo. 199, 252 S. W. 945;
Railroad v. Conarty, 238 U. S. 243, 35 S. Ct. 785, 59 L. ed. 1290;
Lang v. Railroad, 255 U. S. 455, 41 S. Ct. 381, 65 L. ed. 729;
Railroad v. McWhirter, 229 U. S. 265, 33 S. Ct. 858, 57 L. ed. 1179;
Noftz v. B. & O. R. Co., 13 Fed. (2d) 389;
L. & N. R. Co. v. Cook, 150 Ky. 689, 150 S. W. 802;
Brady v. Wabash R. Co., 49 S. W. (2d) 24, l. c. 30-31;
St. L.-S. W. Ry. Co. v. Johns (Tex. Civ. App.), 286 S. W. 281.

(B)

Where the accident which results in the injury merely creates an incidental condition or situation that results in the injury, the failure to comply with the Safety Appliance Act, or the rule or regulation, is not the approximate cause of the injury.

Davis v. Wolfe, 263 U. S. 239, 44 S. Ct. 64, 68 L. ed. 284;
Railroad v. Conarty, 238 U. S. 243, 35 S. Ct. 785, 59 L. ed. 1290;
Lang v. Railroad, 255 U. S. 455, 41 S. Ct. 381, 65 L. ed. 729;
Railroad v. McWhirter, 229 U. S. 365, 33 St. Ct. 858, 57 L. ed. 1179.

(C)

The federal and common law rule is that a railroad employee must look for his own safety, and that a defendant is not liable except that it actually discovered the danger.

Toledo, etc. R. Co. v. Allen, 276 U. S. 165, 48 S. Ct. 215, 72 L. ed. 513;

Martin v. Wabash, 30 S. W. (2d) 735;
Allen v. Terminal Railroad, 68 S. W. (2d) 709.

(D)

The doctrine of assumption of risk applied to licensees and invitees.

Stein v. Battenfield O. & G. Co., 327 Mo. 804, 39 S. W. (2d) 345.

(E)

Plaintiff pleaded the Federal Safety Appliance Act. Consequently it was involved, and is exclusive.

Minneapolis, etc., R. Co. v. Popplar, 237 U. S. 369, 35 S. Ct. 609, 59 L. ed. 1000;
Moore v. Railroad, 291 U. S. 205, 54 S. Ct. 402, 78 L. ed. 755;
Gilvary v. Cuyahoga V. R. Co., 292 U. S. 57, 54 S. Ct. 573, 78 L. ed. 1123.

(F)

The rule that cars having defective safety appliances should not be offered in exchange was not enacted for the benefit of car inspectors.

Thomson v. Downey, 78 Fed. (2d) 487;
C. & O. Ry. Co. v. Nixon, 271 U. S. 218, 46 S. Ct. 945, 70 L. ed. 914;
C. & O. Ry. Co. v. Mihas, 280 U. S. 102, 50 S. Ct. 42, 74 L. ed. 207.

(G)

The kind or amount of evidence required to establish negligence is not subject to the control of the several states.

C. & O. R. Co. v. Stapleton, 279 U. S. 587, 49 S. Ct. 422, 73 L. ed. 861;

Chicago, etc. R. Co. v. Coogan, 271 U. S. 472, 46 S. Ct. 564, 70 L. ed. 1041.

III.

Instruction No. 1, given by the court on motion of plaintiff, is erroneous. It is predicated on facts not in evidence.

IV.

The court erred in permitting rule No. 2, that cars with defective safety appliances should not be offered in exchange, in evidence.

Thomson v. Downey, 78 Fed. (2d) 487.

V.

The verdict is excessive.

Flynn v. Kramer (Mich.), 261 N. W. 77.

BRIEF OF THE ARGUMENT.

I.

The opinion of the Missouri Supreme Court is forceful (Brady v. Terminal Railroad, 102 S. W. [2d] 903), and we offer it as a part of our argument.

We submit that plaintiff failed to make a case for the jury because Wabash Car No. 76085, at the time of the accident to plaintiff, **was not being hauled or permitted to be hauled or in use** on defendant's railroad within the purview or meaning of the Safety Appliance Acts, to-wit, 45 U. S. C. A., sections 11 and 13.

The said railroad car, from which plaintiff fell by reason of the grab iron pulling out, had been delivered by defendant to the Wabash Railroad Company on said Wabash Railroad's exchange track some four hours previously and tendered to said Wabash Railroad for acceptance or rejection. Plaintiff, at the time of the accident, was an inspector and hunting for defective safety appliances. The grab iron that pulled out was a safety appliance. It will be noted that car No. 76085 was never rejected or returned to defendant.

We submit that said car was not in use or being hauled or permitted to be hauled by defendant at the time of the accident to plaintiff. The car had been delivered to the Wabash on its exchange track and tendered to it for acceptance or rejection and the Wabash had accepted it not only for that purpose, or to that end, but it accepted said car unqualifiedly, for the car was not rejected or returned to defendant. It was the absolute and non-delegable duty of the Wabash to inspect said car and certainly ascertain that the safety appliances on same were in good order. It follows that it could not rely on the

delivering carrier not to deliver or tender it dangerously defective cars. The Wabash Railroad had the positive duty of inspection before accepting the train tendered it by defendant. (Kurtz v. Railroad, 238 Mich. 289, 213 N. W. 169).

We are unable to conceive a shade of distinction between a car withdrawn from service or use for repair and inspection. In both cases they are withdrawn from service and use. In both cases, the car inspector and the car repairer are dealing with and hunting for and working upon defective safety appliances. That is the purpose of their work. That is what they are employed to do. The car was not in use, for it had been withdrawn from use for inspection. The hauling and use to which defendant put the car had ceased. It was on an inspection track, the equivalent of a repair track, out of use. It was out of use for inspection purposes. It would not again be put in use until after the inspection. It was the absolute duty of the Wabash Railroad, upon tender, to inspect the car for defective Safety Appliances. A failure to do so or the use of it on its lines would subject it to criminal responsibility by the Government. Be that as it may, it had the positive duty of inspection before accepting the train tendered to it by defendant, as Kurtz v. Railroad, 238 Mich. 289, holds. So, to give opportunity for inspection, the car must necessarily be withdrawn from service and use; and if it is withdrawn from service and use for any purpose, it must perforce be withdrawn from service and use for any and all purposes. The car was wholly out of present use at the time of the accident.

The latest case on the subject that we have found is N. Y. C. & St. L. R. Co. v. Kelly, 70 Fed. (2d) 548, certiorari denied, 293 U. S. 595. At l. c. 550, it is said:

"After a defective car reaches a place of repair, the

Safety Appliance Act is inapplicable because such car has been withdrawn from service and is not 'in use' under the provisions of the Act, nor does merely shifting of cars within the place of repair put the car 'in use' within the meaning of the statute."

At l. c. 551 it is said:

"Had the car in question been en route to a repair place, a different situation would have been presented, but after it reached the repair place, was out of service, the carrier was entirely within its rights in taking off the handhold or any other of the safety appliances necessary to effect repairs, without violating the Safety Appliance Act."

In McCalmont v. Penn. R. Co., 283 Fed. 736, l. c. 739, it is said:

"In the present case no handling was in progress or in immediate contemplation. The car was wholly out of present use. The original putting on of the chain and the further adjustment of the chain were in the nature of temporary repairs which would permit the car to be taken to the shop, and, so long as work of this character is not done as a part of the immediate operation of hauling to the shop, it does not seem important whether the expected interval before hauling is a few hours or a much longer time."

In Sherry v. B. & O. R. Co., 30 Fed. (2d) 487, l. c. 489, it is said:

"It has accordingly been held by this Court that the Act has no application to equipment withdrawn from service and undergoing minor repairs preparatory to early return to service.

"In this case the defective car was not being hauled or used by the defendant, except in that it was stored

temporarily upon one of the ladder tracks. It had been withdrawn from use for the very purpose of undergoing repair. No movement was immediately contemplated, and no action of setting the brakes was necessary, save as incident to inspection and repair."

In Kaminski v. Railroad, 180 Minn. 619, 231 Mo. 189, at l. c. 191, it is said:

"We reach the conclusion that where a bad order car has been withdrawn from service and taken to and replaced in a repair yard where it is being repaired, subsequent to movements of the car, made in the course of work and for the purpose of facilitating it, are not within the operation of the Safety Appliance Act."

In Brady v. Wabash R. Co., 329 Mo. 1123, 49 S. W. (2d) 24, it is held, in substance, that a railroad car is not in service or in use when being inspected by a car inspector hunting for defective safety appliances.

In Reetz v. C. & E. I. R. Co., 46 Fed. (2d) 50, it is held that a railway, in operating a train with defective couplers and drawbars was not liable under statute for freight conductor's death in falling through a railway bridge, as the defective couplers and drawbars were not the proximate cause of injury.

In Kurtz v. Railroad, 238 Mich. 289, 213 N. W. 169, it is said:

(l. c. 170.) "Usual and permitted practice in the yard was that the Pere Marquette, before accepting trains tendered to it, removed dangerously defective cars found therein, or required defendant to do so."

(l. c. 171.) "If an employee of the Pere Marquette had been killed in the circumstances above related, the inspection would not have been a good defense.

It could not rely absolutely on the employees of defendant not to deliver it dangerously defective cars. It had the positive duty of inspection before accepting the train tendered it by defendant.

"The record will sustain a finding that Mr. Gall's (plaintiff) death was proximately caused by the subsequently intervening negligence of the Pere Marquette. Defendant's negligence is remote."

(l. c. 172.) "In such cases the failure to inspect or the negligent manner of doing it is the proximate cause of the injury to the employee, and the negligence of the company turning over the unsafe car is the remote cause."

We deduce from the foregoing cases the following legal conclusions:

(1.) The car plaintiff was inspecting and from which he fell, due to the grab iron pulling out, **was not in service or in use at the time of the accident.** This, because no hauling was in progress or immediate contemplation, for the car was being inspected to determine its future use. The car was wholly out of present use. The car was in storage temporarily for inspection. It had been withdrawn from use for the very purpose of inspection. A car is not in service or use when being inspected by a car inspector searching for defective safety appliances.

(2.) The delivery and tender of the car by the defendant to the Wabash Railroad, or the defective grab iron, were not the proximate cause of the accident. Those were remote causes. It was the absolute duty of the Wabash to inspect the cars. As is said in Kurtz v. Railroad, supra, the failure to inspect is the proximate cause of the injury. The purpose of the inspection was to find defective safety appliances. Plaintiff could expect to find

them for he was looking for them. His act of inspection was the proximate cause.

(3.) Plaintiff's act of inspection was an intervening cause. It was intervening because that was his duty, as the alter ego of the Wabash, to find defective safety appliances. Charged, as he was with the duty of finding the defects, his act of inspection intervened to break any causal connection.

(4.) Plaintiff assumed the risk. It was his duty to look for and discover defective safety appliances. He was legally responsible for failing to discover them. He knew the conditions he would have to cope with. He knew that he would find defective appliances, for that was the purpose of his work. In the contemplation of the law, he knew that they were there. Therefore, the defective grab iron was an open and obvious fact to him.

II.

Plaintiff failed to make a submissible case.

(A) The salient facts, as shown by the record, are that plaintiff was a car inspector, in the employ of the Wabash Railroad, whose duties, as such inspector, consisted in hunting and finding defective safety appliances and equipment on railroad cars, and that he suffered injury while inspecting and hunting for defective appliances in a stationary train of cars and upon finding a defective safety appliance, to-wit: a grab iron upon Wabash Car No. 76085, which had been tendered said Wabash Railroad by defendant for acceptance or rejection. Said car was one of train of cars that a few hours before had been transported by defendant from Missouri to Illinois and

tendered the Wabash Railroad as aforesaid. The purpose of plaintiff's inspection was to determine whether the Safety Appliances on said car and train of cars were in proper condition. Said car and train of cars were placed on track No. 11, in said Wabash Railroad Yards. Both the Wabash Railroad and defendant knew that plaintiff would make the inspection of the said train of cars in that regard. Plaintiff inspected all cars tendered said Wabash Railroad by other railroads. Defendant received said Wabash car No. 76085, from the Wabash Railroad, at St. Louis, Missouri, on November 16, 1927, transferred it to an industry, where it was unloaded, and in the Wabash yards at Granite City, Illinois, tendered it to said Wabash Railroad for acceptance or rejection on November 20, 1927, at 6 p. m. Plaintiff was injured from 3½ to 4 hours later.

We aver that plaintiff was not within the class intended to be protected by the grab-iron act, although we think the case is governed solely by the Federal Safety Appliance Act and the federal law.

The facts show that plaintiff, at the time of the accident, was inspecting and hunting for defective safety appliances on Wabash car No. 76085, which was stationary and had been placed there for inspection by him. It was his duty to hunt for and find defective appliances. Some one must do that. As appliances on cars become defective, some one must be delegated to find them. That is the purpose of the inspection and the reason for the employment of the inspector, that is, to hunt and find defective appliances. As defects inevitably occur, both patent and latent, inspectors, as a matter of law and fact, know they are there. Figuratively speaking, in inspecting and hunting for defective safety appliances, an inspector puts his head in the lion's mouth. If a lion injures the one so doing, no lia-

bility on the owner's part. Thus, one dismantling a building may not recover for injuries in that regard, because the employee makes his own place of work. So, an employee, in inspecting, makes his own place of work and knows that sooner or later he will find a defective safety appliance, and one that may injure him. His very work is a source of danger and puts him at practically every step into peril. But that is the purpose of the inspection. Without defective appliances, no inspection, and without inspection, no job. Without the job, no peril, but of course the peril is an inherent and concomitant element in the job, and plaintiff may not escape it.

An inspector, injured while about his duties inspecting a car for defective safety appliances, does not come within the purview of the Federal Safety Appliance Acts. Consequently, one injured because of a defective grab iron on a car, does not come within its benefit. He is not within the class of persons intended to be covered by the Act. It was intended to provide against injury of those using the cars to operate the trains, such as brakemen, not against injury to one who was hunting for defects for repair prior to the operation of the car in commerce. Plaintiff was not using the grab iron to operate the train, but was inspecting and testing it. It was said, with respect to a defective coupler, in Railroad v. Comarty, 238 U. S. 243, 35 S. Ct. 785, 59 L. ed. 1290, l. c. 1292, that:

> "The principal question in the case is whether, at the time he was injured, the deceased was within the class of persons for whose benefit the Safety Appliance Acts required that the car be equipped with automatic couplers and drawbars of standard height; or, putting it in another way, whether his injury was within the evil against which the provisions for such appliances are directed. It is not claimed, nor could

it be, under the evidence, that the collision was proximately attributable to a violation of these provisions, but only that had they been complied with, it would not have resulted in injury to the deceased."

In Lang v. Railroad, 255 U. S. 455, 41 S. Ct. 381, 65 L. ed. 729, the doctrine announced in the Conarty Case, supra, was re-declared and re-affirmed.

In Rittenhouse v. Railroad, 299 Mo. 199, 252 S. W. 945, it was held that the plaintiff therein, going between cars to inspect and repair a coupler, was not within the purview of the Safety Appliance Act.

The case of Kansas City M. & O. Ry. Co. v. Wood, 262 S. W. 520, is a gray mile case on the subject. It was held, in substance, that a railroad's duty, under a Federal Safety Appliance Act, to equip cars with and maintain automatic couplings for protection of employees, does not apply to a car inspector whose duty it is to inspect and repair defective couplings. Consequently, it was held that the plaintiff therein did not come within the provisions of the Safety Appliance Act. In this connection, in that case (Railroad v. Wood, supra), the Court says:

(l. c. 521.) "The plaintiff alleged, as the chief grounds of negligence of the railway company, the failure of the outgoing inspector, Akin, to note and have repaired all defects in cars in the yards, which included the water car, before he o. k'd them to plaintiff; negligence of the train crew handling the water car in failing to discover, repair and advise him of its defects."

(l. c. 525.) "Thus, it appears that, under the common law, an inspector, whose duty it was to inspect and repair appliances, could not recover for injuries suffered in the course of such employment. Nor do

we think it was the purpose of Congress to create any such new liability as to such employe in the passage of the Safety Appliance Act. As to such employe the risks of the injury are ordinary and such as are necessarily involved in the very nature of the employment. To seek out and remedy defects which the law prescribes must not be allowed to exist is the very thing he is employed to do, and it would be paradoxical to say that the master must furnish him perfect equipment to inspect and repair."

In Noftz v. B. & O. R. Co., 13 Fed. (2d) 389, l. c. 390, it is said:

"If a railroad company is required to furnish repairmen cars that are not defective, upon which to perform the duties of their employment, then defective cars can never be repaired."

In L. & N. R. Co. v. Cook, 150 Ky. 689, 150 S. W. 802, the facts show that the plaintiff, an inspector of engines in a railroad roundhouse, was scalded by hot water from the blow-off pipe, while under an engine inspecting a fire box attachment. Plaintiff could not inspect the engine without going under the boiler, and he knew, when he went under the engine, that the boiler inspector had not inspected the engine. It was not uncommon for the blow-off pipes to leak and water would sometimes spout out, intermittently, as when plaintiff was injured. Held, that the engine and boiler with respect to the danger involved in going under it, constituted one machine, and plaintiff assumed the risk of being scalded by water from the blow-off pipe, it being his duty, as engine inspector, to investigate for danger from that source.

It may be urged that, inasmuch as plaintiff was an employee of the Wabash, the rule is not applicable. We

think that any such contention is aside the question. He was a car inspector, putting his head into the lion's mouth. He was also a railroad yard employee, and, as Congress had occupied the field of interstate commerce relative to grab irons, that occupation of the field was exclusive. Notwithstanding plaintiff did not come within that class, Congress has legislated with respect to grab irons, and the federal rule must be applied. Having taken charge of the field grab irons, the federal rules as to whether the grab iron is within the act must apply necessarily. As we have said the plaintiff was a yard employee, and he was an experienced man. It was his duty to look out for his own safety. The work was being done in the ordinary, usual and customary way. It was a matter of common knowledge, a thing every inspector knew, that cars tendered to the Wabash for acceptance or rejection would have on occasions defective safety appliances. There was no evidence in the record that defendant knew that the grab iron was defective. Plaintiff understood the situation as well as defendant. On this subject, in Toledo etc. R. Co. v. Allen, 276 U. S. 165, 48 S. Ct. 215, 72 L. ed. 513, l. c. 517, the Court says:

> "In the absence of knowledge on their part that he was in a place where he was liable to be struck and oblivious of that danger, they were not required to vary the switching practice customarily followed in that yard or to warn or to take other steps to protect him."

The Supreme Court of Missouri, in Martin v. Wabash, 30 S. W. (2d) 735, l. c. 746, applied that rule, saying:

> "The courts seemingly adhere to and apply the principle of the common law that yard employees, regardless of the class and character of their work, and

regardless of their precise and particular duties, must themselves look out for their own safety, and that switching or engine crews are under no duty or obligation, while engaged in yard movements, to watch out for the safety of yard employees, or to warn them, unless actually seen to be in immediate peril and oblivious thereof." See Allen v. Terminal Railroad, 68 S. W. (2d) 709.

As we have said plaintiff was an inspector and he may not escape the fact that he was hunting for defective safety appliances and that he will be held to have expected them, and to have known that they were existent. He was subject to the federal and common-law rule that yard employees must look out for their own safety, regardless of the class or character of their work, and that engine or switching crews were under no duty or obligation to discover defects, or warn them, unless they actually knew of the defect. This is the common-law rule and plaintiff must abide by it. In Brady v. Wabash, 49 Fed. (2d) 24, l. c. 30-31, while not deciding it, the court was impressed that plaintiff's recovery, because he was an inspector, was barred.

It is true that defendant tendered the car to the Wabash and therefore to plaintiff for inspection. But that was plaintiff's business, that of inspection. His class of work put him out of the protection of the grab iron act, and he assumed the risk. It was his duty to inspect all cars, and he says defendant knew that. The train of cars was in the possession of defendant, for they had not as yet been delivered to the Wabash, and consequently plaintiff took the cars as he found them, and he knew that he would find, or, at least, he could expect to find, defective safety appliances. The doctrine of assumption of risk is not limited to Master and Servant. Others take premises as

they find them. Thus in Stein v. Batterfield O. & G. Co., 327 Mo. 804, 39 S. W. (2d) 345, it was held that the doctrine of assumption of incurred risk is not limited to master and servant cases; that licensees and invitees assume certain risk in going on the premises of another; that an independent contractor, installing electrical apparatus on defendant's premises, was held to assume the risk of conditions obviously dangerous and known to be so.

Plaintiff was an inspector, whose duty it was to hunt for and discover defective safety appliances. He could expect to discover defects in the appliances, and he knew at some time he would find them. In contemplation of law they were there and he was legally responsible for failing to discover them. He could not rely upon the fact that they were not there, as could a switchman. It was the duty of the Wabash and consequently his duty to discover them. If he did not discover them, he was at fault. Thus, in contemplation of the law, he knew they were there. Therefore, the defect in the grab iron was open and obvious to him, as he knew it was there. He was an expert inspector following his own devices and he knew or will be held to have known the conditions he would have to cope with.

In this regard, plaintiff introduced in evidence the rule reading:

> "Rule 2. Yard interchanging cars. Paragraph 3. Cars (whether loaded or empty) having defects in violation of the Safety Appliance Act should not be offered in exchange."

The foregoing rule was not enacted for the benefit of a car inspector. If the rule was ever effective in plaintiff's behalf it had been waived by customary inspection of trains of cars by the Wabash and plaintiff. But it was not

formulated for plaintiff's benefit. It was formulated for the benefit of switchmen and train operatives. Why? Because it was intended to protect only those who operated trains and respect to whom only the duty to inspect was cast. In Thomson v. Downey, 78 Fed. (2d) 487, with respect to a very similar situation and rule, that of keeping a lookout for signals and obstructions by a fireman, it was held that the rule was not promulgated for the protection of section foremen.

Again, in C. & O. Ry. Co. v. Nixon, 271 U. S. 218, 46 S. Ct. 495, 70 L. ed. 914, and C. & O. Ry. Co. v. Mihas, 280 U. S. 102, 50 S. Ct. 42, 74 L. ed. 207, we have cases of such rules held not to be promulgated for the benefit of certain employees. Consequently, if plaintiff's employment does not come within the purview of the rule, then certainly defendant may not be held liable, under the federal and common-law rule, unless it actually knew that the grab iron was defective. Plaintiff was an inspector charged with the duty of finding defects, that of putting his head in the lion's mouth or feeding a cobra. It was his duty to protect himself from being bitten by them. Thus he must look out for his own safety. He could not expect perfect safety appliances, under the evidence, for he knew otherwise. No matter what precautions he took or how careful he may have been, his place of work was hazardous and dangerous and of his own seeking and volition. He could not expect cars with perfect safety appliances to inspect. He was on defendant's property, feeding and handling a figurative cobra, knowing that sooner or later he would encounter danger, an open and obvious peril, which he could expect and which he legally knew.

The rule introduced in evidence does not show or tend to show that it may be made a predicate of defendant's

responsibility to plaintiff. It is no evidence of negligence. An interpretation of it would lead to no other conclusion than that cars should not be offered in exchange when defendant knew they were defective. The interpretation put on said rule by plaintiff is unreasonable and arbitrary. Plaintiff was permitted to predicate liability on it, whether or not defendant knew of the defective safety appliance, even though it could not have discovered it by the exercise of ordinary care. In this connection, it will be noted that plaintiff exercised all the care possible, in testing it, by shaking it with his hand before he put his weight on it, and yet he did not discover that the grab iron in any way was defective. If plaintiff did not discover the defect upon using extraordinary care, then should defendant be held to an absolute discovery of it under the rule? The actual discovery of it by defendant's inspector would have resulted in the same or more serious injury, possibly, to him. We are unable to conceive that the rule meant that it was negligence to tender to the Wabash a car with a defective safety appliance.

The inspection of the car by the Wabash, through plaintiff, constituted an intervening link in the chain of causation. The proximate cause of the injury to plaintiff was not the offering of the car in exchange, but it was the inspection for defective safety appliances by the Wabash, through plaintiff. The inspection broke the chain of causation. The inspection was a cause that intervened. If the Wabash had not caused the inspection to be made, plaintiff would not have been hurt. The Wabash had full and complete control of the car for inspection. While the Wabash was probably endued with the duty of inspecting, so far as brakemen were concerned, it was under no duty to defendant to inspect the train of cars, for it had possession of them for that purpose and could accept it without in-

spection. Their inspection was a matter of indifference to defendant. The inspection was made for their own benefit. Plaintiff's injury resulted from an intervening cause, that of an order by the Wabash to inspect the train. There was no evidence in the record that defendant knew that the grab iron was defective. That must be the limit of the effect of the rule. But, even if not, the record contains no evidence that the defect could have been discovered by the exercise of ordinary care, for plaintiff did not discover it by such care. Consequently the rule in no effect was evidence of negligence on defendant's part.

(B) Of course, if plaintiff did not come within the purview of either the grab-iron act or the rule introduced by plaintiff, then neither one was the proximate cause of the injury to plaintiff. The governing rule is clearly stated in Davis v. Wolf, 263 U. S. 239, 44 S. Ct. 64, 68 L. ed. 284, as follows:

> "The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not the proximate cause of the accident which results in the injury, but merely creates an incidental condition or situation in which the accident otherwise caused results in injury."

We have heretofore attempted to demonstrate, and we think successfully, that neither the grab-iron act nor the rule were promulgated for the benefit of a car inspector. If so, then neither the act nor the rule applied to one hunting and finding defective safety appliances, and such defective appliance could not have been the proximate cause of the accident. In Railroad v. Conarty, 238 U. S. 243, 35 S. Ct. 785, 59 L. ed. 1290, and Lang v. Railroad,

255 U. S. 455, 41 S. Ct. 381, 65 L. ed. 729, it was held that injuries caused by defective couplers, but not in the act of coupling, even though the injuries would not otherwise have occurred, were not proximately caused by the defective couplers, as the coupling act was not intended to cover such conditions. The defective grab iron was not the proximate cause of plaintiff's injury, we think.

(C) In Stein v. Battenfield O. & G. Co., 327 Mo. 804, 39 S. W. (2d) 345, it was held that the doctrine of assumption of risk applies to licensees and invitees, especially where contractual. Now the relation between defendant and the Wabash Railroad was contractual, that of the interchange of cars; and, as plaintiff in that regard was the alter ego of the Wabash to inspect the car, a contractual relation existed between plaintiff and defendant. Moreover, as plaintiff was either a licensee or invitee on the car, an offer to go on the car, and a permission, a contractual relation existed in that connection between plaintiff and defendant.

Of course, plaintiff was not within the provisions of either the grab-iron act, or the rule. He was an inspector searching for defects, figuratively feeding a cobra. An apt illustration is this: "A" contemplates buying "B's" house, but prior to doing so desires to inspect its roof for defects, using a skilled carpenter in that regard, one "C". "C", in inspecting the roof for defects, is injured by a defect, unknown to "A", that he was searching for during his inspection. May "A" be held liable for an injury to "C"? We think not, for the purpose was to find the defect, the very thing he was searching for. He was feeding the cobra.

Plaintiff was upon defendant's premises, searching for defects, to determine whether to accept or reject the car.

He knew as a matter of fact and law that he would find a defective appliance. That was the purpose of the inspection. As an inspector, he took the premises as he found them, and his employment was immaterial. That he was working for the Wabash can make no difference. His status was that of an inspector and he assumed the risk of finding defective safety appliances and of injury.

Here is the situation: Defendant tendered a car to the Wabash, unknown to the defendant to be defective and unknown by the Wabash to be defective when it first delivered said car to defendant four days prior to the injury. It was a Wabash car. Now defendant said to the Wabash, impliedly at least, we tender you that car. The Wabash replied, we desire to inspect it for defects, as did "A" when he contemplated buying "B's" house. The Wabash then sent its inspector, in the role of "C", to search for defects. This the Wabash could do or not as it desired. In other words, the defendant impliedly gave the Wabash permission to inspect the car at its own risk. Was not defendant in the same situation as "B" in permitting "A", by his alter ego inspector, to inspect his roof? It may be said that the inspection of the roof was for "A's" benefit, but was not the inspection of the car for the Wabash's benefit? The Wabash desired the train of cars for the revenue and to recover its property. "A" desired to have the house inspected for his benefit. The meat of the nut is that plaintiff was an inspector, inspecting premises, as a licensee or invitee, not known to be defective, searching for defects on premises that he knew he was liable to find and from which he might suffer injury. He was not in the situation of a brakeman or other employee who could rely upon his place of work as safe. As a matter of fact and law he knew it was not safe. He was without the provisions of the safety appliance act and

the rule. We think it must be held that he assumed the risk.

Under any phase of the evidence, as we view it, logical reasoning compels a finding that plaintiff has failed to make a submissible case. The cause should be reversed outright, we think.

III.

Plaintiff's instruction No. 1 constitutes error. It is predicated on the facts that defendant suffered and permitted the grab iron to be and remain in an insecure condition, when defendant knew, or by the exercise of ordinary care on its part would have known of its insecure condition, and that defendant failed to inspect or discover the grab iron in its insecure condition, when defendant, by the exercise of ordinary care on its part, could and would have discovered its insecure condition.

The record contains no evidence that defendant knew that the grab iron was insecure. That defendant knew that the grab iron was insecure was a necessary element of plaintiff's case under a theory of recovery most favorable to him. In fact, as neither the act nor rule was intended to protect a car inspector, plaintiff's only reasonable and logical theory of recovery, under any circumstances, was that defendant actually knew that the grab iron was insecure. As the record was without evidence in that regard, the instruction was erroneous for that reason. The federal and common law must be applied to the effect that yard employees must look out for their own safety.

Plaintiff, in the alternative also predicated his right of recovery on the fact that defendant could by the exercise of ordinary care, have known of the insecure condition of

the grab iron. As we have shown, plaintiff took the premises as he found them. He was a car inspector, with the duty cast on him to ascertain and discover defects. Unless defendant knew that the grab iron was defective, it was under no duty to inspect and discover, so far as plaintiff was concerned, that the grab iron was insecure. Plaintiff, as car inspector, was without the purview of the grab iron act. Neither it nor the rule were promulgated for his benefit. The Wabash could or not inspect it, as it saw fit. Plaintiff was in the position of an inspector for a prospective buyer of a house, who was injured while inspecting its roof and was hurt by a defect, unknown to the owner. Plaintiff took the premises, for the purpose of inspection for defects as there were. His employment warned him that his work was unsafe, thus rendering the dangers of the work open and obvious. He was not within the class of persons to whom the act or the rule applied. It is obvious, we think, that the instruction in this regard constituted error.

The predicate, in said instruction, that defendant failed to inspect or discover the insecure condition of the grab iron, when by the exercise of ordinary care it could have discovered it, is an involved statement. If plaintiff means that there was an absolute duty to inspect and discover same with regard to a car inspector, which seems to be meant, then the instruction constitutes error, for car inspectors were not within the class of persons covered by the act or the rule. The record contains no evidence that defendant failed to inspect the train, and the burden was on plaintiff to so show, if that was an element of his cause of action. If plaintiff meant, by the instruction, that the defect could have been discovered or known by the exercise of ordinary care, then what we have heretofore said,

with respect to the fact that defendant, by the exercise of ordinary care, could have known of the insecure condition of the grab iron, applies. Viewed from any angle that we may, the instruction constituted prejudicial error, we think.

IV.

The Court erred in permitting plaintiff to introduce in evidence rule No. 2, to wit:

> "Cars (whether loaded or empty) having defects in violation of the Safety Appliance Act should not be offered in interchange."

Common law negligence was predicated on the foregoing rule, which constituted error, for as Congress by legislation has taken charge of grab irons on railway cars, its enactments are paramount and exclusive. And as Congress has taken charge of grab irons on railway cars, the construction of the grab iron act, that is, determining those who come within its provisions, will be decided by the United States Supreme Court. Certainly, the grab iron act is applicable to the situation before us. All enactments and rules with respect to the subject are in conflict with it and are null and void. Defendant, if liable to plaintiff at all, is not liable because it has been guilty of common law negligence of any description, but because there has been a violation of a safety appliance act.

But, in any event, the rule was not promulgated for the benefit of car inspectors, but for the benefit of men who operate trains and who could expect safe working conditions. Plaintiff was not of that ilk, for he was charged with the duty of finding defects and will be held both in fact and in law to have known of the defective condition of the car. We need not elaborate on what we have here-

tofore said regarding the rule, to which we refer. Suffice to say that, if plaintiff's employment did not place him within the purview of the safety appliance act, then certainly his employment did not place him within the purview of the rule. We think the case of Thomson v. Downey, 78 Fed. (2d) 487, rules our contention. The admission of the rule in evidence and the predication of defendant's liability thereon, we think, constituted error.

V.

We submit that the damages awarded plaintiff by the jury were grossly excessive. The record shows no broken bones, no injury except that he fell on his back and his left hip was cut, bruised and rubbed by the cinders. He was at the hospital for six days, then went home where he remained for three or four days and then went to the office where he remained until he acquired "suitis" and filed suit in January, 1928, against the Wabash Railroad. He said he did no work while at the Wabash office, but nevertheless he was paid.

Plaintiff's chief complaint, as to injuries, and almost his sole complaint, for any other injuries he sustained are inconsequential according to the evidence, relates to the fusion or ankylosis of the 10th and 11th vertebrae. This is the injury that he complains of as important, and his petition and testimony are based on the fact, not that the fall caused the arthritis, fusion and ankylosis of the 10th and 11th vertebrae, but that this condition pre-existed the fall, and that the fall reinflamed and re-enacted the condition. Plaintiff's petition in that regard avers:

> "And that on account of said injury, a dormant, pre-existing arthritis thereof was caused to become active and painful; that the arthritis did progress and become aggravated and disabling."

The evidence fails to show any arthritic condition on plaintiff's back relative to the 10th, 11th or 12th thoracic (or dorsal) vertebrae at the time of plaintiff's injury. The evidence does not show any arthritic condition subsequent to plaintiff's injury to the 10th, 11th or 12th thoracic vertebrae, until he was X-rayed by Dr. Peden on February 19, 1929, fifteen months after the injury. It does not show that these thoracic vertebrae were in any way involved prior to that time, and consequently the record is without proof that a dormant pre-existing condition of the 10th, 11th and 12th thoracic vertebrae was lightened up, re-inflamed or re-enacted. Dr. Peden did not know whether the conditions found in the X-ray photographs existed or not before November 20, 1927, nor do the X-rays tell him that, so he said. Dr. Meinhardt did not at any time X-ray plaintiff's thoracic spine, that is, the 10th, 11th and 12th thoracic vertebrae. He only X-rayed the lumbar vertebrae, an entirely different part of the spine, and there he found an arthritic condition antedating the injury to plaintiff and not caused by the injury. There is no evidence in the record that the arthritis of the lumbar spine caused plaintiff's condition complained of at the time of the trial. The condition that plaintiff complains of is the fusion or ankylosis condition of the 10th and 11th thoracic vertebrae and the spurs on the 12th thoracic. Dr. Peden said that the lumbar spine, that which Dr. Meinhardt X-rayed in January, 1928, was comparatively normal, and that said arthritis of the lumbar spine was due to a diseased condition and must have existed before the injury. Dr. Pernoud said that he had no way of knowing how long the condition that he found in February, 1929, as to the 10th, 11th and 12th thoracic vertebrae had been there.

Plaintiff's whole case, as to any permanent injury and as to disability, is predicated on the fusion or ankylosis of

his 10th and 11th thoracic vertebrae and as to the spurs on his 12th thoracic. He pleads that a dormant, pre-existing arthritis became activated, aggravated, progressive and disabling. His evidence tends to show only a disabling condition of the 11th and 10th thoracic vertebrae. It does not show a disabling or a painful condition as to any other part of his body that was permanent. Dr. Pernoud said that the pain in his hip had subsided. Even if the evidence tends to show that the headaches were due to the injury, which it does not, the record is without probative proof that such headaches continued.

The record contains no evidence that plaintiff had an arthritic condition on his 10th, 11th and 12th thoracic vertebrae before the accident. Dr. Meinhardt did not X-ray those vertebrae and, of course, he did not know and could not know that an arthritic condition with respect thereto existed before the accident. Dr. Peden X-rayed plaintiff first on February 19, 1929, fifteen months after the accident, and all he noticed at that time was a slight amount of hypertrophic changes with a slight new bone projection on the 11th thoracic vertebrae. The 11th thoracic was the one that was really the most involved. Dr. Peden further testified that he did not know whether the conditions found in the X-ray photographs, with respect to the 10th, 11th or 12th thoracic vertebrae, existed or not before November 20, 1927, nor do the X-rays tell him that. He said he could not tell the cause of this condition (Abst. 88). Dr. Pernoud testified that he had no way of knowing how long the condition that he found in February, 1929, as to the 10th, 11th and 12th thoracic vertebrae had been there and he could not tell.

Plaintiff does not charge or claim, either in his pleadings or his proof, that plaintiff's fall on November 20, 1927, caused the condition of the 10th, 11th and 12th thoracic

vertebrae as found on February 19, 1929, and thereafter. He does not claim in his petition that the fall caused the arthritic condition of his 10th, 11th and 12th thoracic vertebrae to form, and his only claim is that there was a pre-existing arthritis which was caused to become active, progressive and aggravated and disabling. Nor could he so claim, for there is not a scintilla of evidence in the record in the opinion of any doctor that the fall caused the arthritis later found with respect to his 10th, 11th and 12th thoracic vertebrae. He predicates his case wholly on a pre-existing arthritis as to those vertebrae, which he pleads and claims was reinflamed and re-enacted and lighted up. In that the record contains not a scintilla of evidence that the condition later found of plaintiff's 10th, 11th and 12th thoracic vertebrae pre-existed the accident, or that the accident caused the condition, plaintiff's case in that regard falls to the ground. This was the only condition that it was claimed tended to disable him.

Now the only other evidence as to injuries resulting from the accident that plaintiff claims that he suffered was the reinflaming of his lumbar vertebrae, the pain in his hip, resulting from the bruise of the fall, and headaches.

As to his lumbar vertebrae, the first time Dr. Meinhardt X-rayed was in the early fall of 1928, and in January, 1929. He said the condition of his lumbar spine was due or might have been due to a diseased condition, and some arthritis must have existed before injury (Abst. 55 and 56). The history of the case led him to believe that the injury was lighting up the condition, but he did not say that it was doing so (Abst. 60). Dr. Peden (Abst. 86-87) in this regard testified that his lumbar spine, he thought, he has always thought all the way through, was compara-

tively normal. There was no testimony that the condition of his lumbar spine was in any degree disabling.

While there is evidence that plaintiff had some pain in his hip caused by a bruise, the evidence runs that the pain subsided. Anyway the record contains no evidence of more than a bruise and an abrasion to the hip, nothing of a permanent nature or inconvenience.

While plaintiff testified that he had headaches, there is not a scintilla of evidence in the record that the headaches were in any measure caused by the accident.

We cite Flynn v. Kramer (Mich.), 261 N. W. 77, to show the attitude of a state of large population respecting the subject. In that case, plaintiff, a 51-year-old hoisting engineer, sued to recover for injuries received in an automobile accident. He was employed by the City of Chicago at a salary of $55 a week. He was off two and a half months and was then employed at an easier job at the same pay. His right eye was knocked out, his kneecap smashed, and his frontal bone crushed. The jury returned a verdict of $25,000, and, on appeal, the verdict was affirmed for $10,000, upon a remittitur of $15,000, ordered by the Supreme Court of Michigan.

With respect to the injuries, in our opinion, this case, according to the evidence, has all the earmarks of being abnormally and irregularly magnified.

THOMAS M. PIERCE,
JOSEPH L. HOWELL,
WALTER N. DAVIS,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

THOMAS J. BRADY, *Petitioner,*

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation.

No. 163.

PETITION FOR REHEARING AND RECONSIDERATION, AND BRIEF IN SUPPORT THEREOF.

MARK D. EAGLETON,
Counsel for Petitioner.

MERRITT U. HAYDEN,
ROBERTS P. ELAM,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Petition for rehearing and reconsideration	1–2
Certificate of counsel	3
Supporting brief	4–10
I. The judgment of the Supreme Court of Missouri, entered on the 19th day of February, 1937, reversing outright the judgment of the Circuit Court of the City of St. Louis, Missouri, is a final judgment in Missouri	4
Argument	5
Conclusion	9

Cases Cited.

Abbott v. Kansas City Elevated R. Co., 232 Mo. 616, 135 S. W. 1199	4, 7
Berry v. Majestic Milling Co., 304 Mo. 292, 263 S. W. 406	4, 7
Donnell v. Wright, 199 Mo. 304, 97 S. W. 928	4, 7
Ginnochio v. Illinois Central R. Co., 264 Mo. 516, 175 S. W. 196	4, 7
Gipsy Oil Co. v. Escoe, 275 U. S. 498, 48 S. Ct. 112, 72 L. Ed. 393	8
Kingman v. Western Manufacturing Co., 170 U. S. 675, 18 S. Ct. 786, 42 L. Ed. 1192	8
McGrew Coal Co. v. Mellon, 315 Mo. 798, 287 S. W. 458	9
Morse v. United States, 270 U. S. 151, 46 S. Ct. 241, 70 L. Ed. 518	8
Sabol v. St. Louis Cooperage Co. (Mo. Sup.), 31 S. W. (2d) 1041	4, 7

State ex rel. McGrew Coal Co. v. Ragland (Mo. Sup.), 97 S. W. (2d) 113 9
Strottman v. St. Louis, I. M. & S. R. Co., 228 Mo. 154, 128 S. W. 187, 30 L. R. A. (N. S.) 377 ..... 4, 7
Walsh Construction Co. v. United States Guarantee Co. (C. C. A. 8), 76 Fed. (2d) 240 ..... 4, 8

Statutes Cited.

Revised Statutes of Missouri, 1929:
Sec. 1063 ..... 4, 5
Sec. 1065 ..... 4, 5

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

THOMAS J. BRADY, *Petitioner,* vs. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation.		No. 163.

PETITION FOR REHEARING AND RECONSIDERATION.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Thomas J. Brady, petitioner in the above-entitled cause, and petitions this Honorable Court for a rehearing of his petition for a writ of certiorari herein filed, and a reconsideration of this Honorable Court's order herein under date of October 11, 1937, denying petitioner a writ of certiorari upon the ground that it does not appear from the record that there is a final judgment, and for grounds for this petition, petitioner states:

I.

That the judgment of the Supreme Court of Missouri entered upon the 19th day of February, 1937, and which

petitioner seeks to have reviewed by writ of certiorari, is set out verbatim on pages 173 and 174 of the printed transcript of record filed in this court by petitioner with his petition for a writ of certiorari on the 22nd day of June, 1937.

II.

That said judgment of the Supreme Court of Missouri, reversing outright the judgment of the Circuit Court of the City of St. Louis, Missouri, is a final judgment.

III.

That this Honorable Court, through inadvertence, mistake or oversight, denied petitioner's petition for a writ of certiorari upon the ground that "it does not appear from the record that there is a final judgment."

Your petitioner most respectfully submits herewith his brief in support hereof.

THOMAS J. BRADY, *Petitioner,*

By MARK D. EAGLETON,
Counsel for Petitioner.

MERRITT U. HAYDEN,
ROBERTS P. ELAM,
Of Counsel.

Certificate of Counsel.

Mark D. Eagleton, counsel for petitioner in the above-entitled cause, hereby certifies that the above and foregoing petition for rehearing and reconsideration is presented in good faith and not for delay.

Dated at St. Louis, Missouri, this 1st day of November, 1937.

MARK D. EAGLETON,
Counsel for Petitioner.

SUPPORTING BRIEF.

I.

The judgment of the Supreme Court of Missouri, entered on the 19th day of February, 1937, reversing outright the judgment of the Circuit Court of the City of St. Louis, Missouri, is a final judgment in Missouri.

Sections 1063 and 1065, Revised Statutes of Missouri 1929;

Donnell v. Wright, 199 Mo. 304, 97 S. W. 928;

Ginnochio v. Illinois Central R. Co., 264 Mo. 516, 175 S. W. 196;

Abbott v. Kansas City Elevated R. Co., 232 Mo. 616, 135 S. W. 1199;

Berry v. Majestic Milling Co., 304 Mo. 292, 263 S. W. 406;

Strottman v. St. Louis, I. M. & S. R. Co., 228 Mo. 154, 128 S. W. 187, 30 L. R. A. (N. S.) 377;

Walsh Construction Co. v. United States Guarantee Co. (C. C. A. 8), 76 Fed. (2d) 240;

Sabol v. St. Louis Cooperage Co. (Mo. Sup.), 31 S. W. (2d) 1041.

ARGUMENT.

This Honorable Court, on the 11th day of October, 1937, denied petitioner's petition for writ of certiorari upon the ground that "it does not appear from the record that there is a final judgment." Petitioner most respectfully submits that such order was made by this Honorable Court through inadvertence, mistake or oversight, as the judgment of the Supreme Court of Missouri entered upon the 19th day of February, 1937, and which petitioner seeks to have reviewed by writ of certiorari, appears verbatim on pages 173 and 174 of the printed transcript of record filed in this court by petitioner with his petition for a writ of certiorari on the 22nd day of June, 1937, and is a final judgment in Missouri, if not elsewhere.

Section 1063 of the Revised Statutes of Missouri 1929, so far as it is applicable, reads as follows:

> "The supreme court, St. Louis court of appeals and Kansas City court of appeals, in appeals or writs of error, shall examine the record and award a new trial, reverse or affirm the judgment or decision of the circuit court, or give such judgment as such court ought to have given, as to them shall seem agreeable to law; * * *."

Section 1065 of the Revised Statutes of Missouri 1929 provides as follows:

> "The supreme court, upon the determination of any cause in appeal or error, may award execution to carry the same into effect, or may remit the record, with their decision thereon, to the court from whence the cause came, and such determination shall be carried into execution by such court."

The judgment of the Supreme Court sought to be reviewed by petitioner's petition for a writ of certiorari appears on pages 173 and 174 of the printed transcript of record in this cause as follows (caption omitted):

> "Now at this day come again the parties, aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of St. Louis City rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgment; and that the said appellant recover against the said respondent its costs and charges herein expended, and have execution therefor. (Opinion filed.)"

In the Court's opinion, which immediately thereafter follows in the printed transcript of record, at pages 174 to 183 thereof, inclusive, it is distinctly shown that the merits of the cause were passed upon by the Supreme Court of Missouri, that Court holding that, under the facts involved, the defendant was under neither statutory nor common-law liability to the plaintiff.

In the light of the foregoing, it becomes manifest that said judgment of the Supreme Court of Missouri is final in that it reversed the judgment and decision of the Missouri circuit (trial) court, gave such judgment as seemed to the Supreme Court of Missouri to be agreeable to law, awarded restitution to the appellant, and *awarded execution to carry the judgment of that Court into effect.* At the same time, the said judgment of the Supreme Court of Missouri did not remit or remand the case to the trial court for further proceedings to carry the judgment of the Supreme Court of Missouri into execution, such re-

mission or remand being optional under Section 1065 of the Revised Statutes of Missouri 1929, and *the trial court was thereby deprived of all jurisdiction to further proceed in the cause.* Donnell v. Wright, 199 Mo. 304, 97 S. W. 928; Ginnochio v. Illinois Central R. Co., 264 Mo. 516, 175 S. W. 196; Abbott v. Kansas City Elevated R. Co., 232 Mo. 616, 135 S. W. 1199; Berry v. Majestic Milling Co., 304 Mo. 292, 263 S. W. 406.

In Strottman v. St. Louis, I. M. & S. R. Co., 228 Mo. 154, 186, 128 S. W. 187, 193, 30 L. R. A. (N. S.) 377, the Missouri Supreme Court en banc distinctly said:

> "By statute, we are authorized to enter judgments of simple reversal, and these judgments may or may not be finalities. **If the merits of the cases are adjudicated and passed upon they are final,** * * *. So that, considering the whole statute, we are of the opinion that a reasonable construction thereof precludes the plaintiff from again suing after a judgment of reversal in a case wherein the merits of the controversy have been investigated and adjudicated by the court, and this fact is one of easy determination."

In the more recent case of Sabol v. St. Louis Cooperage Co. (Mo. Sup.), 31 S. W. (2d) 1041, in discussing the previous decision of that same case in 313 Mo. 527, 282 S. W. 425, the Court distinctly said (31 S. W. [2d], l. c. 1044):

> "* * * All of the evidence offered in the first case was fully considered by Division 1, and it held that such evidence was not sufficient to fasten upon defendant liability for plaintiff's injury. It, therefore, reversed the judgment outright.
>
> "How the judgment of a court could more conclusively decide a case upon its merits, we are unable to

comprehend. Had Division 1 felt that plaintiff could have produced evidence to prove negligence on defendant's part, it could and doubtless would have remanded the case for a new trial, instead of reversing the judgment outright. Sykes v. Railway Co., 178 Mo. 693, loc. cit. 715, 77 S. W. 723; Rutledge v. Railroad Co., 123 Mo. 121, loc. cit. 140, 24 S. W. 1053, 27 S. W. 327; Strottman v. Railroad Co., 228 Mo. 154, loc. cit. 187, 128 S. W. 187, 30 L. R. A. (N. S.) 377; Finnegan v. Railroad Co., 244 Mo. 608, loc. cit. 663, 149 S. W. 612. Division 1 had full power to terminate the litigation. **Its order of outright reversal resulted in such termination. That judgment is conclusive and binding, not only upon the trial court, but upon the Supreme Court in division and en banc.''**

Likewise, in Walsh Construction Co. v. United States Guarantee Co. (C. C. A. 8), 76 Fed. (2d) 240, 242, it was distinctly said:

> "It will be found quite uniformly to be the rule that, when an appellate court, finding under the law that no recovery can be had, uses the word 'reversed' without more, this means that the case is at an end.''

If the judgment of the Supreme Court of Missouri reversing the case outright (R. 173-74) resulted in a termination of the litigation and means that the case is at an end, how can such judgment be anything other than a final judgment?

Even though it may be said that under the decisions in Kingman v. Western Manufacturing Co., 170 U. S. 675, 18 S. Ct. 786, 42 L. Ed. 1192; Morse v. United States, 270 U. S. 151, 46 S. Ct. 241, 70 L. Ed. 518, and Gipsy Oil Co. v. Escoe, 275 U. S. 498, 48 S. Ct. 112, 72 L. Ed. 393, *for the purpose of appeal or error,* the judgment of the Su-

preme Court of Missouri entered on the 19th day of February, 1937, did not become final until the motion for rehearing, and motion to modify opinion, filed in that court on March 1st, 1937 (R. 184), were overruled by that court on March 24th, 1937 (R. 191), such judgment of the Supreme Court of Missouri became final *for all purposes* on the 24th day of March, 1937, long prior to the filing of this petitioner's petition for a writ of certiorari which was filed in this court on June 22nd, 1937.

The form of the judgment entered in the Supreme Court of Missouri on February 19th, 1937 (R. 173-174), is practically identical with the form of the judgment entered by that same court in the case of McGrew Coal Co. v. Mellon, 315 Mo. 798, 287 S. W. 458, and this Honorable Court entertained a petition for certiorari to review the judgment in the Mellon case, evidently considering it to be a final judgment, although it did deny the writ of certiorari in 273 U. S. 752, 47 S. Ct. 456, 71 L. Ed. 874. In this connection, see State ex rel. McGrew Coal Co. v. Ragland (Mo. Sup.), 97 S. W. (2d) 113, which discusses this situation at some length.

By reason of the foregoing, petitioner most respectfully submits that the order of this Honorable Court entered on October 11, 1937, denying petitioner's petition for a writ of certiorari upon the ground that "it does not appear from the record that there is a final judgment," was entered by this Honorable Court by reason of a misapprehension, mistake, or oversight, the record having fully disclosed the existence of a final judgment. Accordingly, petitioner

most respectfully submits that his petition for rehearing and reconsideration be sustained.

Respectfully submitted,

MARK D. EAGLETON,
Counsel for Petitioner.

MERRITT U. HAYDEN,
ROBERTS P. ELAM,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 163.—October Term, 1937.

Thomas J. Brady, Petitioner,
vs.
Terminal Railroad Association of St. Louis.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

[January 31, 1938.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The Supreme Court of Missouri reversed a judgment which petitioner had recovered under the Federal Safety Appliance Act (102 S. W. (2d) 903) and rendered a final judgment in favor of respondent. (See *State* v. *Ragland*, 339 Mo. 452, 456, 458.) In view of the importance of the question in the administration of the federal statute, this Court granted certiorari, — U. S. —.

Petitioner was employed by the Wabash Railway Company as a car inspector in its yard at Granite City, Illinois. He was injured in November, 1927, while inspecting a car which was one of a string of cars brought by the respondent, Terminal Railroad Association of St. Louis, from St. Louis to Granite City and placed upon a track of the Wabash known as a "receiving" or "inbound" track. The purpose of the inspection was to determine whether the cars were to be accepted by the Wabash. Both the Wabash and the Terminal companies were carriers engaged in interstate commerce.

While making his inspection petitioner stood upon one of the side ladders of the car, and, in attempting to pull himself to the top of the car, petitioner took hold of a grabiron which, with the board to which it was attached, became loose, causing him to fall. The board was found to have "become rotten from end to end on the under side, and to some extent on the upper side around the bolts by which the grabiron was attached to it".

Petitioner first sued his employer, the Wabash, under the provisions of the Federal Safety Appliance Act, but a judgment in

his favor was reversed upon the ground that the car had not yet been accepted by the Wabash Company which therefore had not hauled or used it, or permitted it to be hauled or used, within the prohibition of the statute: *Brady* v. *Wabash Railway Company*, 329 Mo. 1123. While that suit was pending, petitioner brought the present suit against respondent.

The federal statute (Act of April 14, 1910, c. 160, sec. 2, 36 Stat. 298, 45 U. S. C. 11) provides that

"it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders:"

The Act of 1910 supplemented the provisions of the Act of March 2, 1893, c. 196, 27 Stat. 532 (45 U. S. C. 7) which provided in section 8:

"Any employee of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car, or train in use contrary to the provision of this chapter shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge".

See, also, Federal Employers' Liability Act, 35 Stat. 65, c. 149, sec. 4 (45 U. S. C. 54).

The first question is whether the car can be said to have been in use by the respondent at the time in question. The statute gives no ground for holding that it was the intent of Congress that in a situation such as is here presented neither the Wabash nor the Terminal Association should be subject to the statutory duty. The "use, movement or hauling of the defective car", within the meaning of the statute, had not ended when petitioner sustained his injuries. *Chicago Great Western R. Co.* v. *Schendel*, 267 U. S. 287, 291, 292. The car had been brought into the yard at Granite City and placed on a receiving track temporarily pending the continuance of transportation. If not found to be defective, it would proceed to destination; if found defective, it would be subject to

removal for repairs. It is not a case where a defective car has reached a place of repair. See *Baltimore & Ohio R. Co.* v. *Hooven*, 297 Fed. 919, 921, 923; *New York, C. & St. L. R. Co.* v. *Kelly*, 70 F. (2d) 548, 551. The car in this instance had not been withdrawn from use. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 21, 22; *Delk* v. *St. Louis & San Francisco R. Co.*, 220 U. S. 580, 584-586; *Great Northern Railway Co.* v. *Otos*, 239 U. S. 349, 351; *Chicago Great Western R. Co.* v. *Schendel, supra.* The car was still in use, though motionless. *Minneapolis, St. Paul & Sault Ste. Marie Rwy. Co.* v. *Goneau*, 269 U. S. 409. In view of that use, either the Terminal Association or the Wabash was subject to the obligation imposed by the statute.

The question then is whether the responsibility of the Terminal Association, which brought in the car, had ended. We think that question is answered by the undisputed fact that it was placed by the Terminal Association on the receiving track to await inspection and acceptance by the Wabash.

The Wabash had not accepted it. The jury, which found for petitioner, were instructed that as a condition of that verdict it was necessary for them to find that petitioner "was required to go upon said car for the purpose of inspecting the equipment thereon and of accepting or rejecting said car on behalf of his employer, the Wabash Railway Company". We cannot agree with the view, expressed in the opinion of the state court in reversing the judgment, that "granted that the cars were still (in the legal sense) in the possession of the Terminal", it might still be held that "the right of control" had passed to the Wabash. As the Wabash had not accepted the car, the Wabash had not assumed control and petitioner was examining the car in order to determine whether the Wabash should assume control.

As the car had not been withdrawn from use and was still in the possession of the Terminal Association, its statutory obligation continued and the question is whether that duty was owing to petitioner. The fact that petitioner was not an employee of the Terminal Association did not necessarily absolve it from duty to him. We have said that "the nature of the duty imposed by the statute and the benefits resulting from its performance" usually determine what persons are entitled to invoke its protection. It was in this view that we held that the power brakes required by the Safety

Appliance Act were not only for the safety of railway employees and passengers on trains but also of travelers on the highways at railway crossings. *Fairport R. Co.* v. *Meredith,* 292 U. S. 589, 596, 597. In the instant case, petitioner in the course of his duty would have occasion to go upon the car and use the grabiron, and accordingly the benefit of the statute would extend to him, although he was not employed by the carrier holding the car in use, unless he was outside the scope of the statute because of the special character of his work. His work was that of inspection to discover defects of the sort here found to exist as well as others.

This final question must be determined in the light of the nature of the obligation resting upon the carrier in relation to the use of a defective car. The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care however assiduous. *St. Louis & Iron Mountain Rwy. Co.* v. *Taylor,* 210 U. S. 281, 295; *Chicago, Burlington & Quincy Rwy. Co.* v. *United States,* 220 U. S. 559, 570; *Louisville & Nashville R. Co.* v. *Layton,* 243 U. S. 617, 620, 621; *Great Northern Railway Co.* v. *Otos, supra.* The breadth of the statutory requirements is shown by the fact that it embraces all locomotives, cars and similar vehicles used on any railway that is a highway of interstate commerce and is not confined exclusively to vehicles engaged in such commerce. *Southern Railway Company* v. *United States,* 222 U. S. 20. Laying down this comprehensive rule as a matter of public policy, Congress has made no exception of those employed in inspecting cars. The statute has been liberally construed "so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the Act". *Swinson* v. *Chicago, St. P., M. & O. Rwy. Co.,* 294 U. S. 529, 531. In *Davis* v. *Wolfe,* 263 U. S. 239, 243, reviewing the earlier cases, the Court held that one can recover "if the failure to comply with the requirements of the act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection". Even where the required equipment is known to have become defective and the car is being hauled to the nearest available point for repairs, while the Act relieves the carrier in such a case from the prescribed penalties, the carrier still remains

subject by the express terms of the statute to civil liability for injuries sustained by "any railroad employee" in the course of such a movement by reason of the defective equipment. Act of April 14, 1910, c. 160, sec. 4, 36 Stat. 299 (45 U. S. C. 13). See *New York, C. & St. L. R. Co.* v. *Kelly, supra.*

We think that these considerations require the conclusion that one is not to be denied the benefit of the Act because his work was that of inspection for the purpose of discovering defects. As we said in *Louisville & Nashville R. Co.* v. *Layton, supra,* the liability "springs from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in or the work which he may be doing at the moment when he is injured", provided the defective equipment is the proximate cause of the injury.

The fact that petitioner was looking for defects of the sort which caused his injury does not prevent recovery as the statute expressly excludes the defense of assumption of risk. 45 U. S. C. 7, 54.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice CARDOZO took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.